2004

Rhonda Merryweather v. Carson R. Callister : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

RHONDA MERRYWEATHER,	:	
Plaintiffs/Appellant,	:	Case No.: 20010431
vs.	:	
CARSON R. CALLISTER,	:	Argument priority 15
Defendants/Appellee.	:	

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE FIRST DISTRICT COURT
HONORABLE BEN H. HADFIELD

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LIST OF ALL PARTIES

The caption of this case on appeal contains the names of all parties.

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STATEMENT OF JURISDICTION

This court has jurisdiction over this matter pursuant to Utah Code Annotated Section 78-2a-3 (j) (1996).

ISSUES AND STANDARDS OF REVIEW

The following issues are presented to the court for review identified with the respective standards of review:

1. Whether defendant is entitled to a new trial by virtue of surprise evidence, specifically that the plaintiff had been demoted the day before trial, which information was not disclosed until part way through the trial. A trial court's denial of a motion for mistrial or a new trial for surprise evidence is reviewed for an abuse of discretion. Roundy v. Staley, 984 P.2d 404, 410, 1999 UT App. 229 (Rule 59). The surprise evidence appeared in trial on September 26, 2001. (V. 4, p. 91).[1] The issue was also preserved by the motion for a new trial grounded upon the issue of surprise. (R. 716).

2. Did the trial court err in refusing to tell the jury the defendant was serving a mission for his church in Brazil and thus absent from trial. Connected with this issue is whether this error was exacerbated by improper closing arguments. The standard of review for the admission of evidence varies depending on the type of evidence at issue. State v. Pena, 869 P.2d 932, 938 (Utah 1994). In civil cases, the trial court's decision to admit evidence or refuse to admit evidence is reviewed under grant of discretion. Id. at 938. This issue was preserved by arguments in pre-trial conferences, as well as in the trial itself.

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[1]All references to the trial transcript refer to the volume number. The record citation is R.840.

(R. 519; R. 571; V.1, p. 31; 1175, ps. 68, 70 and 90).

3. Whether improper remarks in opening statement and closing argument warrant a new trial. The trial court's rulings is reviewed for an abuse of discretion. First General Serv. v. Perkins, 918 P.2d 480 (Utah App. 1996). Plaintiff's plea to poverty is preserved at R.572. Objections to the statements are also found at V. 2, p. 225; V. 6, ps. 166, 231, and 242; V. 7, p. 18, l. 10; V. 8, ps. 86 and 88. The prejudicial statements are reproduced within the brief. Reversal on this issue is also required under the plain error standard. State v. Harrison, 419 Utah Adv. Rep.11, 2001 UT 33 (April 13, 2001).

4. Did the trial court err in allowing expert testimony which lacked certainty and reliability as required by law. The admissibility of expert testimony under the Rimmasch standard is reviewed for an abuse of discretion. State v. Brown, 948 P.2d 337, 340 (Utah 1997). This issue was preserved via objections which were overruled. (ps. 95, 112, 118). The trial court's selection, interpretation, and application of a particular rule of evidence is reviewed for correctness. Stevenett v. Wal-Mart Stores, Inc., 1999 UT 80, ¶ 8, 977 P.2d 508.

5. Did the trial court err in allowing extrinsic evidence to impeach a witness' testimony in rebuttal of evidence introduced by plaintiff. This issue is reviewed for abuse of discretion. Astill v. Clark, 956 P.2d 1081, 1086 (Utah App.1998). This issue was preserved via objection at trial. (R. 171).

6. Was the potential juror Mr. Tams improperly dismissed for cause. The trial court's ruling on whether to dismiss the juror for cause is reviewed for abuse of discretion.

State v. LeLeae, 1999 UT App. 368, ¶ 23,993 P.2d 232. The issue was preserved at trial. (V. 1, p. 101, l. 19; p. 105, ls. 8-12).

7. Do all of the errors outlined result in cumulative error which undermines this court's confidence that a fair trial was had. Cumulative error is an issue of appellate review, and therefore a de novo review of the totality of the circumstances is required. Parsons v. Barnes, 871 P.2d 516, 530 (Utah 1994); Whitehead v. American Motors Sales Corp., 801 P.2d 920, 928 (Utah 1990).

DETERMINATIVE STATUTES AND CASES

Defendant is unaware of any statutes which are determinative of this case.

State v. Rimmasch, 775 P.2d 388 (Utah 1989) and Patey v. Lainhart, 1999 UT 31, 977 P.2d 1193 are determinative in this matter. By virtue of defendant's motion for a new trial, Utah Rule of Civil Procedure 59 has been implicated.

STATEMENT OF THE CASE

Factual Background. This case arises out of an automobile accident involving plaintiff Rhonda Merryweather and defendant Carson Callister on February 28, 1997 in Tremonton, Utah. (R. 6) As a result of the accident, plaintiff claimed she suffered injuries and was eventually diagnosed with myofacial pain syndrome, for which she has received treatment from a variety of health care providers continuously since October of 1997. Although plaintiff only had one documented visit to a doctor in February of 1997, and a single documented visit to a therapist in June of 1997, plaintiff claimed her neck had hurt continuously until October of 1997, although she missed no work whatsoever. In October

of 1997, plaintiff awoke one morning in such pain that she was hospitalized on a morphine drip and has been under chronic pain treatment ever since. Defendant argued the case presented a low speed accident which could not have caused the injuries claimed. A significant dispute arose concerning the speed of the impact. Further, the medical issues surrounding causation of plaintiff's alleged problems were hotly contested. The accident was reported by the police as a non-injury accident.

At trial, plaintiff's experts testified that plaintiff would likely require ongoing treatment for the rest of her life. Plaintiff's experts further testified that plaintiff should have "discretionary income" or "access" for needs that "may" arise. Based upon this testimony, plaintiff's economic expert indicated that plaintiff would suffer lifetime out-of-pocket expenses including both lost wages and ongoing medical expenses between 1.25 and 1.75 million dollars.

Defendant ascertained that a strong argument could be made against plaintiff's future wage and medical loss claims based on the fact that in the year prior to trial plaintiff was earning a higher income than she had prior to the subject accident. She was working 50-60 hours a week. This fact undercut plaintiff's assertion of future earnings and functional capacity loss. These arguments were presented by defense counsel during opening arguments in reliance upon the information brought forth in discovery. Plaintiff even conceded defendant's commitment to this position. (V. 5, p. 5, lns 1-11). Three days into trial, and after defendant's opening statement, plaintiff proffered the testimony of her job supervisor to the effect that the day before the trial commenced, plaintiff was demoted

from her high paying job to a job that would be paying her less income and providing less hours. Plaintiff's supervisor testified that in his opinion, plaintiff's poor job performance was related to her physical limitations and addictive behavior. Plaintiff in no wise had disclosed this information to the defendant.

The plaintiff's demotion at work came as a complete surprise to the defendant. Defendant alleged at trial that he could not have guarded against this information through discovery and that by virtue of no mention being made of it until midway through trial defendant was prejudiced.

During opening statement, plaintiff's attorney referred to anticipated evidence of plaintiff's exorbitant lifetime medical expenses allegedly necessitated by the accident, asking the jury a number of times "Who is going to pay?" Defendant alleged at trial that the statements on behalf of plaintiff were clearly intended to elicit sympathy from the jury because of the allegedly monumental medical bills facing the plaintiff in the future. Defendant moved for a mistrial, which motion was denied.

At the time of trial, defendant Carson Callister was serving as a missionary for the LDS church in Brazil. However, the trial judge would not allow defense counsel to tell the jury where Mr. Callister was. After urging this ruling, Plaintiff's counsel then improperly argued concerning prejudicial reasons for Mr. Callister's absence.

Defendant also objected to the foundation, specifically under State v. Rimmasch, 775 P.2d 388 (Utah 1988) and its progeny, to the testimony of Dr. Rollins and Dr. Randal which objections were overruled by the court. (R. 95, 112, 118). A thorough analysis of

the foundation is provided below.

During defendant's case in chief, Dr. Scott Knorpp who had performed an exam of the plaintiff was called with regard to plaintiff's alleged medical condition and the underlying causation therefore. Plaintiff's counsel's cross-examination focused on two alleged conversations between Dr. Knorpp and a physical therapist wherein Dr. Knorpp allegedly attempted to suborn false testimony from the physical therapist through threats and intimidation. Dr. Knorpp denied these allegations. Thereafter, over objection, plaintiff called the therapist to rebut testimony elicited from Dr. Knorpp on cross-examination. Defendant maintained that it was improper and prejudicial to allow plaintiff to call the therapist as a rebuttal witness. The trial court overruled these objections.

Marshaled evidence regarding future medicals. Plaintiff called a number of witnesses who potentially could have testified concerning future medical expenses. Mr. David Rollins, a PhD "rehabilitation specialist," testified as the primary witness for future plans for treatment. Mr. Rollins is not a medical doctor. (V. 5, ps. 76, 77). He is not a psychologist. (P. 77, l. 13). He relied on Dr. Ashburn heavily. (P. 83, ls. 17-18). Mr. Rollins testified plaintiff needed "access to the goods and services for the indefinite future." (P. 94, l. 24 - p. 95, l. 1). Defendant made the specific foundational objection that plaintiff had failed to meet the standard for admissibility under State v. Rimmasch, in that the testimony involved a unique type of science. (V.5, ps. 95-96). This objection was overruled and no further foundation was required. Mr. Rollins testified the diagnoses in his report "is not my diagnosis but the diagnosis came out of the medical records just

referring to the type of anomaly that she had and the fact that it was secondary to a motor vehicle accident." (V.5, p. 97, l. 23 - p. 98, l.1). Mr. Rollins testified:

> Question: Are you saying she is going to see a neurologist ten times, an orthopod ten times? What are you telling the jury?
> Answer: I am just saying that she should have access on suitable and appropriate basis to these specialists.
> Question: As a group?
> Answer: No.
> Question: Sometimes she may in a given period of time see only a neurologist or only psychiatrist or only pediatrist. The idea being that she does needs to have access even when the need is there and if she doesn't then have that established and doesn't have the discretionary funds to do that, she may not be able to access that service from that specialist.

(P. 100, ls. 7-19). Mr. Rollins stated that his conclusions were made upon a reasonably probable medical/rehabilitation basis, but did not provide the foundation for his conclusion. Mr. Rollins testified that he got his values for future medical events by taking the median of his estimation of the number of visits plaintiff would need "access" to, and the median price for those medical doctors. (P. 101, ls. 8-13).

Mr. Rollins indicated that he found the values from a publication entitled Medacode and then tried to adjust those for Northern Utah. (P. 101, ls. 15-25). Mr. Rollins did not testify how Medacode came up with those values or whether Medacode is a compilation of data typically used by experts in his area, or whether it is reliable. Mr. Rollins claimed that his opinion was based upon "rehabilitation probabilities," but did not explain the basis of his conclusion. No underlying data was discussed. Mr. Rollins testified concerning his report, which was also entered over defendant's objection (P. 99, l. 14) that plaintiff would need "access" to physicians, "access" to vocational counseling, "access" to a health club,

psychological counseling, "access" to a homemaker chore person, and "access" to medical devices she might need, including a possible and implantable simulator, as well as an implantable pump. Mr. Rollins also testified that the plaintiff would need $750.00 a year in medications for the remainder of her life. Mr. Rollins testified that including in his estimations was $20,000.00 every seven years for implants. That therefore the plaintiff would need seven to eight implants in her lifetime. (P. 109). Mr. Rollins testified that the maintenance of the device would be $500.00, half of which was for actual medication.

Mr. Rollins assumed plaintiff would go with a medication pump as opposed to any other devices he mentioned, although he did not indicate the basis of his belief. (P. 106-111). Mr. Rollins indicated that medication for the pump would constitute half of the $7,500.00 figure. Mr. Rollins did not discount his conclusion of half the $7,500.00, if the plaintiff used a device that did not require medication. Mr. Rollins while testifying that half the $7,500.00 figure would be for maintenance did indicate that the devices typically had a warranty of three to four years. (P. 109, l. 18). Accordingly, Mr. Rollins' calculations of $7,500.00 a year did not account for the fact that there would be periods of three to four years where the device would be covered by warranty, with intervening periods of approximately two years where the actual costs of maintenance might potentially be borne by the plaintiff. Mr. Rollins indicated that he got his estimations for repair from "Aeromactronics," but because the court did not require further foundation, the exact basis of his conclusion is unknown. Voir dire was had by the defendant where Mr. Rollins testified as follows:

Question: And how many rehabilitation specialists do what you do.
Answer: I wouldn't have any idea, probably several hundred.
Question: The school that you attended to receive your PHD degree no longer offers a PHD degree in your area, does it.
Answer: Not in that area. They still offer the degree, but in different areas.

(P. 112, ls. 11-16). Thus, Mr. Rollins indicated that he did not even know how many like experts were in existence, but admitting that he had no idea, guessed at several hundred. The school that he received his degree from does not even offer his degree anymore. Defendant renewed his motion that greater foundation needed to be laid under Rimmasch to meet the gate keeping function of the court. (P. 112, l. 19). Further, the defendant objected on the same Rimmasch standard to Dr. Randall's testimony. Dr. Randall was an economist who simply took the numbers which Mr. Rollins gave him and extrapolated therefrom. The court denied this motion as well. (P. 118, ls. 15-17).

Mr. Rollins testified that absent "funding" plaintiff would be unable to have regular full time or part time work. (P. 120, ls. 118-122). He testified that absent the accident "it's reasonably or occasionally probable that Mrs. Merryweather would be currently providing traditional nursing care in a hospital setting." (P. 125, l. 23 - p. 126, l. 2).

On cross examination, Mr. Rollins reaffirmed he was not a medical doctor and made no medical diagnosis. (P. 136, l. 14). Mr. Rollins verified that he had believed that the plaintiff had suffered a herniated disc, which was wrong. (P. 138, ls. 2-4). Mr. Rollins was not aware of any study or exam which showed the cause of the plaintiff's pain. (P. 139, l. 32). Dr. Rollins testified as follows:

Question: Would you please give us an idea of how many cases of cervical whiplash with no positive radiographic signs of injury you have dealt

with in the course of your career as rehabilitation expert.

Answer: I would have no way of knowing because I don't deal with the diagnosis.

(P. 140, ls. 6-11). Mr. Rollins testified as further:

Question: Let me ask you to assume that during the acute period right after her accident, starting February 28, she saw Dr. Chad Merrill once on February 28, and then the records show a June 9th physical therapy visit and no other medical treatment, no other visit to a medical doctor until October 17, during which time she continued to function, go to work, not miss any employment. Wouldn't that lead you to believe that either those doctors you say she needs are not related to this accident or perhaps she doesn't need to see them.

Answer: Well, it's not a matter of need. It's a matter of access on an as needed basis as a preventative measure to have access to those specialists to prevent her problem from becoming progressively worse. If we want to maintain her highest level of function I agree with Dr. Ashburn, she needs to be monitored and needs to be engaged with specialists who can monitor preventative measures of care to keep her as functional as she can be in spite of her pain, in spite of her limitations.

(P. 144, l. 8 - p. 145, l. 1).

Mr. Rollins admitted that he had not done anything to validate his conclusions regarding lost wages. (P. 146, ls. 20-22). Mr. Rollins testified that his line of work is not an exact science, but an art. He testified that:

Question: Dr. Rollins, would you agree that what you do is not an exact science.

Answer: I would say that most people, therapy, support people, rehab people, follow more of an artform, but they do rely on scientific information, statistical data, etc. But a lot of it is just like nursing, personal nursing care has a lot to do with art. Art of dealing with people.

(P. 147, ls. 14-20). Further Mr. Rollins testified:

Question: But you continue to say that her lifetime wage loss will reflect that change in her current behaviors from returning to work and over achieving.

Answer: It can. I am not saying it will. It can and it happens in many instances

> where you have individuals who have perfectionist-like attitudes who want to please, who want to demonstrate that they can contribute to the well-being of another human being. And by making that effort which is very virtuous is sometimes self-defeating. It sometimes is their undoing.

(P. 149, ls. 7-16). Mr. Rollins testified that he does not follow up on the majority of his patients to see if his conclusions were correct. (Ps. 153-154).

Dr. Michael Ashburn, a professor of anaesthesiology and a medical doctor who has conducted a fellowship in pain management, testified as one of the plaintiff's treating physicians. (V. 4, p. 6, l. 20; p. 7, l. 15). Dr. Ashburn explained the diagnosis and treatment of chronic pain. (Ps. 27-29). Dr. Ashburn indicated that the plaintiff would be on medication for the rest of her life. (P. 33, l. 17). Dr. Ashburn testified that currently plaintiff was using a fentanyl patch which is 100 times more powerful than morphine. (P. 36, l. 13). Dr. Ashburn diagnosed plaintiff with myofacial pain syndrome, as well as facet arthrosis, generalized anxiety disorder, and sleep disturbance. (P. 43, ls. 1-10). He indicated that his examination of the plaintiff showed her to have spasming in the muscles of her neck and shoulder areas. (P. 45, ls. 4-5).

While Dr. Ashburn testified that the plaintiff would need medication for the rest of her life, he was not specific as to what medication she would need. (P. 56, l. 18). Dr. Ashburn indicated that the plaintiff had had nerve blocks in the past, (Ps. 54-59), and that the plaintiff might need implantable therapy. (P. 67, ls. 10-25). Dr. Ashburn did not testify that Rhonda Merryweather would need an implant for the rest of her life, but that an implant pump would need to be tried on a trial basis. (P. 73, l. 12). Whether or not the

implant was to be used was a decision to be left up to the plaintiff. (P. 77, l. 24). Dr. Ashburn indicated that if the implant were done, that he would see the plaintiff approximately every 90 days. (P. 83, l. 9). Refills for the medication would be taken care of through the mail. (P. 83, l. 8). Dr. Ashburn estimated that the plaintiff would need to see a doctor 8 to 12 times a year for the rest of her life (P. 84, l. 20), although he did not explain exactly who she would see and why. Clearly, the doctor was not referring to himself as he had already indicated that he would see her only every 90 days. The doctor testified that that "may mean" a neurologist, othropod, physiatrist, pain expert, etc. (P. 85, l. 1). As to whether she can perform her job duties, Dr. Ashburn testified: "I don't have enough personal information available to me to make a determination that she can perform her duties adequately." (P. 95, l. 17). Dr. Ashburn testified that pain can result from no structural abnormality. (P. 99, l. 3).

Dr. Ashburn testified that pain can be totally psychological in nature. (P. 99, l. 10). Dr. Ashburn recognized the plaintiff had gone nearly eight months between the accident of February of 1997 and October of 1997 without seeing a doctor. Dr. Ashburn was not aware that in the eight months between the accident of February of 1997 and October of 1997 that the plaintiff only had one documented physical therapy visit. (P. 102, l. 9). Dr. Ashburn did believe there was a "mechanical" reason for the pain. (P. 104, l. 13). Only ten percent of his practice consists of persons who had suffered cervical whiplashes. (P. 108, l. 8). Dr. Ashburn was not aware that the plaintiff had been working 50 to 60 hour weeks. (P. 118, l. 15). Dr. Ashburn stated that his pain clinic had occupational therapists,

(P. 128, l. 13, p. 129, l. 3), but plaintiff had not received such services at his institution. (P. 128, l. 16 - p. 128, l. 7).

Dr. Bryson Smith, a neurosurgeon, discussed his treatment of plaintiff. He stated there was no objective findings of nerve root or spinal cord compromise. (P. 159, l. 2). He simply supervised the October, 1997, hospitalization of plaintiff, and believed that the October hospitalization was related to the motor vehicle accident. (P. 172, l. 16). Dr. Smith acknowledged that neck pain problems can develop without any known cause. (P. 176, ls. 1-3). Dr. Smith acknowledged that his notes indicated that the plaintiff denied neck pain upon discharge of the hospital on October, 1997. (P. 182, l. 17). He gave her no restrictions concerning her employment when he discharged her. (P. 183, l. 6). Dr. Smith acknowledged that to use a morphine drip or pump for patients for who have neck problems is not very common. (P. 183, l. 9).

Dr. Merrill testified as a general practitioner from Tremonton. (V.4, p. 189). He treated the plaintiff prior to the accident and knew of no prior injuries. (P. 195, l. 25). Prior to the accident she had been in good health. (P. 196, l. 11). After the day of the accident, and up until October of 1997, the doctor can recall no conversations with plaintiff regarding ongoing pain. (P. 204, l. 3). Dr. Merrill testified that a history of a ripping and tearing sound in the neck is unusual. (P. 204, l. 25). He indicated that he had made undocumented house calls to the plaintiff's home. Dr. Merrill believed the October complications where a result of the motor vehicle accident. (P. 217, l. 25). After visiting the plaintiff on February 28, 1997, immediately following the motor vehicle accident he

told the plaintiff to come back if she needed to, the plaintiff never returned until October 19, 1997. (P. 221, l. 3). Dr. Merrill continued to treat the plaintiff, and never told her not to work but to change her work habits. (P. 226, l. 3).

The plaintiff, Mrs. Merryweather, related her employment history as a nurse. (V. 6, ps. 12-15). Mrs. Merryweather testified that she told defendant's father and the investigating police officer at the accident scene that her neck hurt. (Ps. 30-33). As to an implant device, Mrs. Merryweather testified she intended to go ahead with a "simulator." Mrs. Merryweather did not discuss a pump. (P. 56). Mrs. Merryweather did not discuss her plans for future medical treatment. Mrs. Merryweather was aware the accident was reported as "non-injury." (P. 79, l. 10).

A medical exam was conducted at the request of the defendant by Dr. Scott Knorp. Dr. Knorp, after reviewing plaintiff's medical records and examining plaintiff, concluded that the events surrounding the severe neck pain in October of 1997 and subsequent ongoing problems were not related to the motor vehicle accident and that the plaintiff did not suffer from any disability therefrom. (V. 7, ps. 15-23).

Course of proceedings. In jury selection, Mr. Tams was excused for cause to which defendant objected. The entire episode is related in the body of the brief. A verdict was rendered in the amount of $1,300,568.00. (R. 705). The jury awarded $13,000.00 in past medical damages, $115,568.00 in future medical damages, $240,000.00 in past and future earnings, and $32,000.00 in general damages. Thereafter, a motion for a new trial was made. (R. 716). The trial court ordered supplemental briefing on the motion for a new

trial. (R. 837). Ultimately, however, the trial court denied the motion for a new trial, and the final order was entered on March 27, 2001. (R. 1141). Thereafter, defendant filed its notice of appeal April 17, 2001. (R.1154). A copy of the judgment and special verdict are attached as Addendum A. Copies of the rulings relative to the new trial motion are attached as Addendum B.

SUMMARY OF THE ARGUMENT

The trial court must be reversed and the defendant given a new trial. The defendant was a victim of an unfair trial both by the trial court's erroneous rulings and failure to remedy prejudicial situations. This appeal presents this court with a precedential decision which will establish how cases are tried in the state of Utah.

Defendant was prejudiced by plaintiff's unfair surprise evidence at trial, since the defendant had already committed to a position regarding plaintiff's lost wage claim in opening statement. Heading into trial, defendant had a strong argument against plaintiff's claim for future lost wages. Upon reviewing plaintiff's tax returns, plaintiff had actually been promoted to a job in which paid her more money. Unbeknownst to defendant, plaintiff was demoted at her job shortly before trial. Although plaintiff's demotion was therefore known to the plaintiff and her counsel before the commencement of trial, such demotion was not revealed to defendant until the trial was well underway.

Last minute disclosure of surprise evidence has long been disfavored by the courts. Where the defense reasonably relied upon the information disclosed during the discovery phase of the case, particularly tax returns which showed an increase in income, not a

decrease, a mistrial or new trial should have been granted. Such trial by ambush is considered abhorrent by the courts. A review of the transcript shows that plaintiff's knowledge of the demotion occurred before trial and that, in essence, a well laid trap was thus set for the defendant. Having the transcripts in hand, one can see the manner in which the ambush is laid. Only when the witnesses were on the stand, and shortly before the foundational witnesses would testify, was the defendant advised of this new evidence.

The prejudice suffered by the defendant was not something the trial court could undo. Even if the trial court attempted to instruct the jury, which it did not, defendant's counsel had already committed to a position in opening statements. It would appear to the jury that defendant's counsel was wrong and advocated a position which was not true. Thus, the prejudice could not be remedied.

Inappropriate and prejudicial statements by plaintiff's counsel also warrant a new trial. A new trial is warranted by the failure of the trial court to tell the jury where the defendant was. Defendant Callister was serving as a missionary in Brazil. While the defendant consented to move forward with the trial in the absence of the defendant, the trial court should have told the jury where Mr. Callister was. When the trial court indicated it would not tell the jury where the defendant was, defendant moved for a continuance. The overwhelming prejudice is highlighted by the fact that plaintiff moved the court to manacle the defendant into only saying that the defendant was out of the country. After applying these restrictions, plaintiff went on in numerous instances to show her affiliation with a predominant religion in the state. As a final straw, after insuring that no response

could be forth coming, in rebuttal argument at the close of the trial plaintiff's counsel then inappropriately surmised for the jury why the defendant was not present and wrongly inferred that the absence was designed by defense counsel.

Further, the statements and comments by plaintiff's counsel require a new trial. Plaintiff's counsel repeatedly attacked defendant's counsel. Many courts have held that similar comments as those made by plaintiff's counsel warrant a reversal. Utah case law supports the conclusion that a new trial must be granted. Plaintiff's counsel further went on to insert his personal opinions in the trial, which personal opinions not only violate the Utah Rules of Personal Conduct, but also case law on the issue. Lastly, all of these arguments were designed to have the jury base its verdict on the basis of sympathy or prejudice, and particularly the inflammatory remarks of Plaintiff's counsel. Plaintiff's counsel inferred plaintiff's inpecuniosity by asking the jury "Who is going to pay."

Next, the trial court should have granted the defendant a directed verdict since the evidence presented does not support the verdict. Particularly, the evidence presented by plaintiff's witness David Rollins cannot support the verdict since such evidence was inadmissable under both the rules of evidence regarding experts as well as State v. Rimmasch and its progeny. Instead of testifying that the plaintiff would suffer certain damages, the expert witness' testimony was only that the plaintiff might suffer such damages and plaintiff should have "access" to such damages. Severe prejudice was suffered by defendant in this regard.

Except for the testimony of Dr. Rollins, there is no other basis within the evidence

for the jury to conclude such damages were warranted. Of the jury verdict of 1.3 million dollars, over $750,000.00 of that verdict is attributable to these future medical expenses. In response to defendant's objections, the trial court simply indicated that defendant could attack the conclusions in cross examination. However, the proper issue before the court was admissibility, not the weight of evidence that could be attacked on cross. Thus, the defendant suffered great prejudice by having this evidence admitted. The jury clearly based their decision upon that evidence. Therefore, a new trial must be granted.

Further, the trial court erred by allowing plaintiff to call a witness to rebut the testimony elicited from a defense witness on cross examination. Rebuttal evidence has been defined as evidence which refutes, modifies or explains an opponent's evidence. In the present circumstances the evidence elicited by the plaintiff was then rebutted by further evidence offered by plaintiff. Evidence first introduced by cross examination cannot be considered evidence presented by the opponent's case in chief. State v. Barney, 681 P.2d 1230, 1231 (Utah 1984). It is therefore improper to allow plaintiff to call a rebuttal witness to evidence that plaintiff had himself elicited and can fully have anticipated. Where the plaintiff can reasonably have anticipated the evidence, that evidence should have been put on, if relevant and at all, in plaintiff's case in chief.

Lastly, the trial court erroneously excused juror Tams, which prejudiced defendant by effectively giving the plaintiff more peremptory challenges than the defendant.

ARGUMENT

I. DEFENDANT WAS PREJUDICED BY PLAINTIFF'S UNFAIR SURPRISE EVIDENCE

Defendant was prejudiced by plaintiff's surprise evidence regarding a demotion since defendant had already committed to a position regarding plaintiff's lost wage claim in opening statement. Heading into trial, defendant had a strong argument against plaintiff's claim for future lost wages. In his report tendered during discovery, plaintiff's rehabilitation expert, David Rollins, testified that plaintiff's injuries would require ongoing treatment for the rest of year life and would result in a yearly wage loss to plaintiff during the rest of her working years. Based on that testimony, plaintiff's economist prepared a report indicating that plaintiff would suffer lifetime out of pocket expenses, including both wage loss and ongoing medical expenses, between 1.25 million and 1.75 million dollars. The problem with these projections, and thus the credibility of plaintiff's experts, was the plaintiff's income in the year prior to trial had actually increased beyond her pre-accident income, severely mitigating the equated projections made by plaintiff's experts. This fact undercut the credibility of plaintiff's experts, and also served as evidence of future earning capacity, as well as her functional capacity.

Unbeknownst to defendant, plaintiff was demoted at her job the day before trial. She would be receiving less income and less hours than she had before the accident. Later, plaintiff's supervisor would testify that plaintiff's poor job performance was related to her physical limitations and narcotic addiction arising from the accident.

Although the plaintiff's demotion was known to plaintiff's counsel before trial, such

demotion was not revealed to defendant until three days into trial, and significantly, after defense counsel's opening statement. Plaintiff's sole aim was to conduct trial by ambush. The defense made a motion in limine seeking to prevent the introduction of this evidence, or in the alternative, a continuance so that further discovery could be had to explore this last minute development. The trial court denied the motions.

Last minute disclosures have long been disfavored by the courts. The Utah Supreme Court held: "The purpose [of Utah's discovery rules] is to... remove elements of surprise or trickery so that the parties and the court can determine the facts and resolve the issues, as directly, fairly, and expeditiously as possible." Ellis v. Gilbert, 429 P.2d 39, 40 (Utah 1967). Rule 59(a)(3) of the Utah Rules of Civil Procedure provides that "surprise, which ordinary prudence could not have guarded against," is grounds for a new trial. Here, evidence of plaintiff's demotion came as a surprise to the defense. Plaintiff had been deposed prior to trial and the fact that the plaintiff would be demoted or was even being considered for demotion was never mentioned. The defense reasonably relied upon the information disclosed during the discovery phase of this case, particularly plaintiff's tax returns which showed an increase in income, not a decrease.

Obviously, the defense could not have prepared for or guarded against an event that occurred shortly before trial. The evidence of plaintiff's demotion being sprung on the defense three days into trial justifies a new trial. Even extraordinary prudence on the part of the defendant could not have guarded against this information.

Such a trial by ambush is considered abhorrent by the federal courts as well.

Indeed, the federal courts have held that one of the main purposes of the amendments to the Federal Rules of Civil Procedure (a model for the Utah Rules) was to permit broad discovery in an effort to avoid "trial-by-ambush." Martino v. Baker, 179 F.R.D. 588, 589 (D. Colo. 1998).

Royalty Petroleum Co. v. Arkla, Inc., 129 F.R.D. 674 (W.D. Okla. 1990) presents a factual situation similar to the present case. In Royalty Petroleum, the defense filed a supplemental interrogatory response on the eve of trial pertaining to conversations relevant to the action, including a conversation involving plaintiff's counsel. Upholding the trial court's decision to exclude the evidence, the Royalty Petroleum court stated:

> The problem posed by defendant's untimely interrogatories submission is clear. Based on the previous deposition testimony of Medlin, coupled with the initial interrogatory response filed by Arkla, plaintiff's counsel, Goresen, had no expectation that on the eve of trial Arkla would assert the existence of a "one on one" conversation with Goresen involving a critical issue in the case. This is, at bottom, at least a trial-by-ambush tactic which simply cannot be permitted in modern federal practice.

Royalty Petroleum, 129 F.R.D. at 678. See also Shelak v. White Motor Co., 581 F.2d 1155, 1159 (5th Cir. 1978).

Similar to Royalty Petroleum, the defense in this case relied upon previous information garnered through discovery to form the entire defense strategy to plaintiff's claims of significant future damages. Defendant had no expectation, nor warning, that plaintiff would be demoted shortly before trial. In fact, the situation presented in this case is even more egregious than Royalty Petroleum. Here, the information regarding the plaintiff's demotion was not revealed to the defendant until three days into trial, after

defense counsel had already made opening statements and cross-examined other witnesses. Such trial by ambush tactics cannot be countenanced by this court.

Defendant was provided plaintiff's medical and employment records even after the discovery cut off in this case. Plaintiff was not promoted to her higher paying administrative position until after her deposition had been taken. Plaintiff's problems regarding her new position did not fully crystalize until after the discovery cut off. Any claims by the plaintiff that defendant could have somehow garnered this information simply is untenable.

In the initial pleading opposing a new trial, plaintiff repeatedly asserted that neither plaintiff's experts nor plaintiff's counsel were aware of the demotion until the trial had already started. (R. 747, 748, 763). However, a review of the trial transcript shows that plaintiff did have such superior knowledge. Plaintiff clearly understood the claim she was making as she entered trial. Having the transcripts of the trial in hand, one can see the manner in which the ambush was laid. In opening statements, plaintiff's counsel intimated to a reduction or change of working conditions. Of course, it was not until a week later that defense counsel and the court became aware of the totality of the changes which the plaintiff's counsel spoke of in his opening argument. Plaintiff's counsel stated:

> What Mr. Jex will testify to is she's having a very difficult time. She's having a very difficult time doing this job. In fact, they keep moving her from job to job and changing her duties and making them smaller and smaller. Mr. Jex when asked if he could hire her to be full-time administrator and work in that position, if she can't do hands on nursing any more, does she have the wherewithall, the ability and strength, to do full-time administrative, his answer was no. She, through Dr. Ashburn, has recently cut her hours down to 32 hours a week. She has an interesting job, where you have 32 hours to do shift work and also on call work, which means the hospital

> may or may not need you, so they pay you like 12 per cent of your wage, two or three bucks an hour, as long as you stay in Tremonton, or as long as you're 15 or 20 minutes away from the hospital. If they have an emergency, you get a pittance, but at least that way the hospital is staffed. So she's down to 32 hours a week in this new accommodated job.

(V.1, p. 162, ls. 4 - 23). Of course at the time this statement was made, defense counsel had no idea what plaintiff's counsel was talking about. This statement shows that plaintiff's counsel at that time was intimately familiar with the facts of the demotion. Later, when confronted by an allegation by defendant that an ambush had occurred, plaintiff's counsel alleged that he did not know that a change in job led to a reduction of income. In light of the opening statement, this assertion appears hollow.

> The Court: When was Mr. Ivie advised of this for the first time.
> Mr. Harris: I gave it to him yesterday.
> The Court: Was that the first time he had notice of her change in employment status.
> Mr. Ivie: I would like a record; yesterday at noon lunch break.
> The Court: You are telling me that her employment status changed as of September 18?
> Mr. Harris: Correct. When Dr. Randall and I met with Mr. Jex on Monday, that's when he informed that she was no long 40 hours, that they had created this 24 hour plus job a week.
> The Court: When was she told about it.
> Mr. Harris: When she was told.
> The Court: When was the plaintiff told about it.
> Mr. Harris: Sometime in September as they were going though [sic] and making this effective.
> The Court: I assume before you were.
> Mr. Harris: Yes, I had, and I stated in my opening argument that changes had been made and she was in labor and delivery. I didn't know if that was part of the full-time or how that all worked out, but meeting with Mr. Jex on Monday, that's when we found out the breadth and extent of it. I don't see it any different than a medical bill or medical record or employment record.

(V.5, p. 12, l. 18 – p. 13, l. 18).

Accordingly, giving plaintiff every benefit of the doubt, the information constituted a surprise for both parties. Apparently, acknowledging the prejudice upon the defendant, plaintiff's counsel then attempted to argue that he did not know of the change in job assignment until Monday, September 25th. (V.5, p. 17, l. 12). Looking back, however, plaintiff and her counsel knew of the financial import of this change from the beginning. Plaintiff's counsel stated in opening statement:

> What we will do is show you the before, what her ability was, what kind of shifts she could pull. All of her on call stuff, all of her home health care. We relate that to now, with the 32- hour-a-week restriction and those kinds of things.
>
> And there's a differential between what she can earn. Thirty-two hours a week is a day a week less working for the rest of her work life. The average work life– – some bean counter somewhere calculated how long women work and how long men work. The average work life for women, and I don't remember what the report says exactly, but its in the high fifties or low sixties. So you run that out and do the same kind of thing.

(V.1, p. 166, l. 17, – p. 167, l. 4).

For plaintiff to claim after the fact they did not understand the financial impact of this change until later in trial appears disingenuous. The record clearly reflects that defense did not know about this change until, at the earliest, lunch break on September 26, 2000. However, prior to letting the defense know, plaintiff unleashed its ambush on the unsuspecting defense.

> Mr. Harris: I want to state this as a hypothetical that Mr. Jex will talk about the in the morning, but I want you to assume that Rhonda's administrative [position] at the hospital being the number three person in the hospital was terminated as of this month, and I want you to you assume – –
>
> Mr. Ivie: Your Honor, I will object that this assumes facts not in evidence in which I suspect if it is offered in evidence may be considered speculative and thus should not be the subject of a hypothetical until it

is actually ruled admissible.

Mr. Harris: Mr. Jex will be here tomorrow to lay all this out. He isn't here yet.

The Court: I don't know whether– –

Mr. Harris: It isn't speculative, it's happened.

The Court: Has his deposition been taken?

Mr. Harris: No. Your Honor, it's not speculative. It's a fact, it's happened.

The Court: Well, you are suggesting some things that we haven't yet heard in evidence.

Mr. Harris: You have do that by hypothetical. I think it's the only way I can do it.

Mr. Ivie: Yes, and a proper objection is it assumes facts not in evidence. Now, if I had a reasonable certainty that a specific fact would be admitted in evidence, but at this point it hasn't been offered, and I have reason to suspect that it would not be admissible. So until we actually have an opportunity to hear that fact, I will object that it assumes facts not in evidence.

The Court: Perhaps we need to excuse the jury for a minute and make an adequate record here.

Mr. Harris: Sure.

(V.4, p. 91, l. 7 – p. 92, l. 12).

Thus, the ambush took place in its original volley prior to the lunch break on September 26, 2000, (V.4, p. 116 (lunch break)). While such an ambush is prejudicial under any circumstance, it is even more so when it takes place in front of the jury with no notice whatsoever to the defendant.

Under Rule 59, the lack of this evidence to be timely disclosed warrants a new trial. Such evidence was material evidence to the issue of wage loss. This evidence was not cumulative of any other evidence in the trial. Such surprises always warrant a new trial. The only circumstances where a new trial is not warranted for such an ambush is where another party could have guarded against the surprise. Powers v. Genes Building Materials, Inc., 567 P.2d 174, 176 (Utah 1977).

The fact of plaintiff's demotion and the reasons for such demotion given at the trial

affect not only the issue of lost wages as an item of damage, which issue alone warrants a new trial, but the issue is also inflamatory as to the plaintiff's claim for general damages. It is simply unjust to sustain the trial court in allowing a verdict to stand under these circumstances. According, the trial court abused its discretion, and a new trial must be granted.

II. INAPPROPRIATE AND PREJUDICIAL STATEMENTS BY PLAINTIFF'S COUNSEL WARRANT A NEW TRIAL

Defendant maintains that comments of plaintiff's counsel in opening statement and in closing argument warrant a new trial. Three issues are herein presented all of which cause prejudice to the defendant: (1) the failure of the trial court to tell the jury exactly where the defendant was, (2) improper arguments by plaintiff's counsel during closing arguments regarding the location of the defendant, and (3) an impermissible plea to poverty in opening statement.

A new trial is warranted upon the failure of the trial court to tell the jury exactly where the defendant was. At the time of the trial, defendant Callister was serving as a missionary for the LDS church in Brazil. (R. 1175, p. 69, l. 17). While defendant agreed to move forward with the trial in the absence of the defendant, the trial court should have allowed the defendant from the beginning of the trial to explain where Mr. Callister's absence. The trial court recognized the prejudice which could confront the defendant. "I think it would be unfair to not give an explanation. I don't want to leave in their minds where is the guy? Is he not interested, locked up, what's going on. That would be unfair." (R. 1175, p.70, ls. 22-25).

However, after consideration, the trial court sanctioned exactly that unfair event. Not allowing the jury to know where the defendant was prejudiced the defendant in allowing the jury to speculate as to Mr. Callister's location, improperly inferring that while the jury had to spend two weeks of their life listening to the trial that Mr. Callister was not interested in the litigation or its outcome. Finally, plaintiff's counsel, after laboring to keep the location of the defendant a secret from the jury, argued and testified in closing argument as to the reason for defendant's absence.

Interestingly, plaintiff claimed that to let the jury know where defendant was would unduly prejudice the plaintiff. Plaintiff alleged such religious reference would create sympathy for the defendant. (R. 841, p. 22, ls. 15-19; R. 1175, p. 71). However, during the course of trial, plaintiff showed no hesitancy in repeatedly advising the jury of her connection with her church with vernacular terms such as "young women" and "ward," leaving the unmistakable impression as to her religious affiliation.

While the defendant was restricted from making even the allusion to defendant being on a church affiliated mission, Brad Merryweather testified that Rhonda played in a softball league sponsored by the "church." (V. 2, p. 46, l. 18). In regards to the sporting activities, Brad Merryweather explained:

> Question: Volleyball, I think he said, was that a casual thing, or was that a league as well?
> Answer: That was church. She would coach volleyball and basketball for the young women.

(V. 2, p. 47, ls. 9-10). Plaintiff herself testified that she did not play sports in high school, "but I did it for church activities." (V. 6, p. 8, ls. 13-14). She obviously expressed herself

as a church going individual when asked about problems with laxatives and identified one of the problems occurring at church. (V. 6, p. 68, l. 23). Mrs. Merryweather indicated that her city league was broken up into "church zones." (V. 6, p. 18, l. 3). In discussing who she had discussed her inability to play softball with, plaintiff answered: "Fae Skinner. Our wards just had gotten split so there like the new year or two before." (V. 6, p. 117, ls. 20-21). Again at the same time plaintiff indicated that the leagues were broken up into ward divisions. (V. 6, p. 117, l. 3). All of this was done in contrast to a defendant who only in closing argument could allude a single time to where the defendant actually was.

In plaintiff's rebuttal argument, plaintiff's counsel claimed that the defense was actually hiding Mr. Callister. Plaintiff's counsel argued:

> I submit to you there's a reason why Mr. Ivie chose to try this case with his client over seas in Brazil. His experts argue with his client. His experts think his client is full of beans. His experts all say he was wrong. It doesn't help him to put on a guy with a short hair cut on that witness stand and have me get out his deposition and say how fast were you going, Carson?

(V. 8, p. 84, ls. 18-24). In effect, knowing full well the defense had asked for a continuance to allow Mr. Callister to return home, plaintiff misrepresents to the jury the desire of the defense not to have Mr. Callister present. Again, plaintiff's counsel argues: "I submit to you that the reason Carson isn't here, when he will be home by the end of the year, there is a reason why he isn't here." (V. 8, p. 87, ls. 9-12). Not only is the disparate treatment unfair, but the misrepresentations and improper arguments of plaintiff's counsel in closing argument warrant a new trial alone.

Plaintiff's counsel's statements in closing argument warrant a new trial. The

only remedy for the improper statements of plaintiff's counsel is a new trial. To reward the plaintiff's counsel in the present matter by not reversing, while acknowledging the impropriety of statements, provides the defendant with no remedy whatsoever, and invites the same conduct in the future if attorneys think their only reprimand will be a slap on the hand. A new trial is warranted where an attorney's "comments" constitute misconduct when they call the juror's attention to matters not proper for their consideration and when the comments have a reasonable likelihood of prejudicing the jury by significantly influencing its verdict. State v. Jimenez, 2001 UT App. 68, ¶ 9, 21 P.3d 1142.

Attacks on opposing counsel. Initially, it should be pointed out that plaintiff's counsel asked the jury to do exactly what they should not. Particularly, plaintiff's counsel asked the jury not to compare the relative merits of the case, but to compare the case in terms of their attorneys. Plaintiff's counsel argued:

> Now, when it comes down to it, the thing you're going to discuss in there is did Mr. Harris prove Rhonda's case? Did he tell you the truth? Did Mr. Harris try to confuse you or miss lead you? Did Mr. Harris meet his burden as set forth in those instructions? Were Mr. Harris' experts qualified to know what they were talking about? And then, the reverse of that, you have to ask the same questions about Mr. Ivie. Did he tell you the truth in this case? Did he attempt to mislead you in this case? Did he attempt to confuse you in this case? Were his witnesses qualified? Did his witnesses bring into this court any biases or history or connection with the defense firms of the state?

(V. 8, p. 13, ls. 4-15). Thereafter, plaintiff's counsel attacks defense counsel in following particulars:

> I submit to you that the defense in this case has been an orchestrated attempt to mislead and confuse you with half truths. I mean, I love that statement, what's the matter with Mr. Harris. He keeps asking these people what information did they get or not get. The experts all said they had plenty of information to come up with an

> opinion. Well, ya, but not on this case. Not on the facts of this case. Why confuse them with the facts? Why give Mr. France the facts, medical or the physical facts, from any of the witnesses? Sure they have plenty of information to come up with an opinion, but it has nothing to do with this case.

(V.8, p. 86, ls. 15-25). Plaintiff continued to attack defendant's counsel:

> That wasn't news to him. For him to stand up and read that one little snippet– – he just read one page. Didn't Ms. Fenstermaker give him the whole deposition? Does he not have all the information, like he didn't give France and everybody else all of the information? It makes me crazy.
>
> If you have all of the facts, the facts are available, and you think you witnesses are any good, why not give them the facts? Why not have their opinions be based on every thing out there like Dr. Limpert had? Like Chad Merrill, like Dr. Smith, like Dr. Ashburn? We didn't hide anything from them. The reason you don't do that is because you don't like the facts.

(V.8, p. 87, l. 24 - p. 88, lns. 2-10.)

> He's in his office trying to do some kind of effort to suppress what is already known. What Mr. Ivie would know if he had read the deposition of Teresa.
>
> It's the same kinda thing, if you don't like the facts, misquote them, hide them, change them, enter into a gentleman's agreement not to have them. Dr. Knorpp's conduct in this case isn't a lot different than what has gone on otherwise.

(V. 8, p. 89, ls. 2-10.).

Courts universally recognize that such comments constitute reversible error. In Commonwealth v. Hawley, 401 N.E.2d 827 (Mass. 1980), a prosecutor accused defense counsel of being an active participant, and perhaps leader, of a plot to commit perjury. The appellate court reversed while stating there was no evidence to permit such an inference and that such inflammatory remarks were prejudicial. Likewise, in Missouri K.T.R. Co. of Texas v. Ridgway, 191 F.2d 363, 369 (C.A. 8 1951), plaintiff's counsel stated that defense counsel was "characterized by hypocrisy, fraud, dishonesty and buffoonery. They sought

to conceal evidence, disobeyed court orders, resorted to...stalling maneuver[s]...and attempted to make the administration of justice as difficult as possible." The Ridgway court held that "counsel must keep within the evidence and may not employ language not justified by the record, or resort to uncalled for personal abuse, and it is highly reprehensible for counsel in argument to use, without supporting evidence, language implying facts have been suppressed by opposing counsel." Id. at 369-370.

Even the courts of Utah have held that it is improper to comment on a defendant's strategy and use of evidence for the apparent purpose of inflaming the jury. State v. Begishe, 937 P.2d 527, 529 (Utah App. 1997). Many cases reach similar conclusions. Griffith v. Shamrock Village, Inc., 94 So.2d 854, 857 (Fla. 1957)(case reversed where counsel suggested that opposing party and witnesses committed perjury and collusion); Lewis v. Cotton Belt Rout - St. Louis Southwestern Railway Co., 576 N.E.2d 918, 978 (Ill. App. 5 Dist. 1991)(it is improper in closing argument to impugn the honesty of the opposing attorney and witnesses and to ascribe bad motives to the opposing party).

Personal opinions of plaintiff's counsel. Utah Rule of Professional Conduct 3.4(e) states in pertinent part:

> A lawyer shall not:
>
> (e) in trial...assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justice of a cause, the credibility of a witness [or] the culpability of the civil litigant[.]

In reviewing the witness called by the defense in this matter, plaintiff's counsel remarked: "It makes me crazy." (V. 8, p. 88, l. 4). Plaintiff's counsel thus improperly commented on

the veracity of the witnesses, which is the prerogative of the jury and not counsel. In Silva v. Nightingale, 619 So.2d 4, 5 (Fla. App. 5 Dist. 1993), the court stated that, "[I]t is axiomatic that a lawyer's expression of his personal opinion as to credibility of a witness, or of his personal knowledge of facts in the case, is fundamentally improper." In the present matter plaintiff's counsel made the improper assertion that defense witnesses had based their opinions on facts having "nothing to do with this case." (V.8, p. 86, ls. 18-25). In Kroger Grocery & Banking Co. v. Stuart, 164 F.2d 841, 844 (8th Cir. 1947), defense counsel improperly remarked that plaintiff's counsel had "tried everything except the facts." The Stuart court ruled this remark had "nothing... to do with the merits of the controversy... and was improper and offensive and the refusal of the court to direct the jury to disregard it was error."[2] Id.

As stated above, plaintiff's counsel insinuated a sinister motive to the decision of defendant to try the case without Mr. Callister being present. Mr. Harris personally opined as to what Carson's testimony would have been had he been present. In State v. Pabst, 996 P.2d 321, 326 (Kan. 2000), the court, citing the Kansas Rules of Professional conduct, stated that an attorney should not assert personal knowledge. Silva v. Nightingale, 619 So.2d at 5, recognized: "It is improper for an attorney to take on during argument the guise of an impeaching witness." This is essentially what plaintiff's counsel was doing by stating what Carson would say in his testimony.

Improper attack based on fees. Finally, plaintiff's counsel improperly attacked

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[2]In the present matter, no curative instructions were given by the court.

Dr. Knorpp and Dr. Weight on the basis of their fees. In Commonwealth v. Shelly, 373 N.E.2d 951, 954 (Mass. 1978), a prosecutor contended in closing arguments that defense's expert witnesses were "bought" because they were paid fees. The prosecutor stated, "Are they going to hire somebody and bring him into court if they are not going to testify to what they want them to testify to?" Id. at 954. The Shelly court held it was improper and unfair to urge an inference that defendant purchased testimony when no facts in evidence supported such an inference. Id. Similarly, plaintiff's counsel in the present case stated that Dr. North had "104,000 reasons a year to tell you things" and Dr. Weight "has made over a million dollars peddling his clinical psychology degree before juries and for 90% of defense at least." There was no evidence before the jury that the opinions were fabricated and not within the professional realm of the witness.

In LaRusso v. Pollack, 449 N.Y.S.2d 794 (N.Y.A.D. 1982), defense counsel improperly implied that plaintiff's expert witnesses were bought. "I paid the thousand, you voice my theories," stated defense counsel in closing. Id. at 795. The LaRusso court ruled this was inflammatory and reversed the judgment and granted a new trial. The same results should obtain here. All of the above stated comments were highly inflammatory.[3] In addition to violating rules of professional conduct, the statements of plaintiff's counsel violate all rules of evidence as plaintiff's counsel is not under oath, his opinion is irrelevant and prejudicial, and such comments are not admissible. Given the multiplicity of occasions

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[3]Venning v. Roe, 616 So.2d 604 (Fla. App. 2 Dist. 1993)(counsel accused opposing party of committing fraud on the court by employing a doctor who "prostituted" himself).

where this rule is transgressed, the only appropriate remedy is the granting of a new trial. While cross-examining a witness as to whether he does more work for defendants than plaintiffs, defendant's witness stated:

> Witness: I–I– as you well know, I do much more defense work.
> Mr. Harris: I do know.

(V.6, p. 166, l. 24-p. 167, l. 1). At that point, the trial court sustained an objection, and asked counsel to restrict himself to asking questions. Apparently, this admonition could not be heeded. When Dr. Weight indicated he did not talk to any family member because plaintiff's counsel "had instructed them not to talk to me," plaintiff's counsel testified: "That's correct– – that's absolutely correct." (V. 6, p. 231, l. 20). Again, plaintiff's counsel was admonished just to ask questions.

After an answer by witness Paul France, plaintiff's counsel testified:

> Mr. Harris: That's right. Because it's my job to get to the bottom of – – of your opinions and see if they hold water.
> Mr. Ivie: Objection, your Honor.
> The Court: Sustained. Counsel you are not under oath. Ask questions.

(V. 6, p. 242, ls. 3-7).[4]

In attacking counsel and defendant's witnesses, plaintiff's counsel wrongfully stated "I don't like these guys. You can tell I don't. I feel that– –." (V. 8, p. 95, l. 9). An objection was made and the parties were asked to approach the bench. At no time did the trial court give any curative instruction. In reality, curative instructions are of little use

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[4]Plaintiff's counsel requested to voir dire a witness during direct, and began his examination by stating to a witness: "That's a nice looking suit today– –." (V. 7, p. 18, l. 10), where upon plaintiff's counsel even acknowledged that it was a comment and not a question that he was asking. Id. at l. 12.

when inflammatory comments are made; the prejudice has already been done.

There can only be a remedy and sanction of reversal in this case. To sustain the present verdict is to allow an unfair trial to stand. To admonish counsel in future cases to not engage in like activity is to highlight that there is no real remedy or penalty. In short, unless the court reverses, this court will invite similar actions in future cases.

Improper plea to poverty. Defendant stipulated to the fault. (V. 1, p. 126). Accordingly, "the rule is well established that where liability is admitted, evidence going only to liability, in the absence of claim of punitive damages, is not admissible." Jones v. Carvell, 641 P.2d 105, 111 (Utah 1982). With fault admitted, "accountability" is irrelevant. During opening statement, plaintiff's attorney referred to expected evidence of exorbitant claims of lifetime medical expenses. Plaintiff's counsel then states: "Well, she says, okay, but is this expensive. Who is going to pay for all of this pain management." (P. 152, ls. 21-23). "Now, she asks who pays for all of this medication, who is going to pay that I can't work full time, who's going to pay for this stimulator device?" (P. 153, ls. 13-15). "That's why she asked who is going to pay for all this stuff." (P. 166, l. 5). Defendant objected to plaintiff's improper argument. (V. 1, p. 138). No curative instruction was given. The court's admonition to refrain from argument was wholly ignored.

Of course, it is axiomatic that opening statement should not include argument. State v. Lafferty, 749 P.2d 1239, 1254 (Utah 1988). It has long been the law in Utah that pleas plainly designed to elicit sympathy or to inspire passion or prejudice are improper and

should not be allowed. Eager v. Willis, 410 P.2d 1003, 1007 (Utah 1966). In Donahue v. Intermountain Health Care, 748 P.2d 1067 (Utah 1987), the court upheld a trial court's grant of a new trial because of improper remarks designed to "appeal to the social or economic prejudices of the jury." The court found improper and prejudicial an argument which stated: "[I]t is an awesome– – it is an awesome thing that you are being asked to do. In our system, a small, but injured party, is allowed, through the jury system, to take on the strong and the mighty, and have an even chance of success." Plaintiff's counsel's also argued that suing IHC is "a little like suing mother nature in this community...." The supreme court held counsel's improper comments could have prejudiced the jury and caused them to render an inflated verdict. Id. at 1068.

The exact inverse argument was made in the present case, inviting the same prejudicial result. The plaintiff waived the issue of relative poverty before the jury's eyes asking them to base their verdict on sympathy and thus render an inflated verdict. The parties stipulated that $42,421.26 had been incurred and that those expenses were reasonable for the treatment rendered. (V. 6, p. 6, l. 5). Plaintiff highlighted this stipulation in closing argument. (V. 8, p. 34, l. 18). Due to this stipulation, the amount of these damages were fixed. Nevertheless, the jury awarded $13,000.00 or 30% of those damages. On the other hand, the jury awarded $750,000.00 in future medical expenses. The jury so acted even in light of the fact there was no evidence that those medical expenses would be incurred to a certainty. Thus, on its face the verdict appears to have been simply inflated to a large round number.

Federal courts have also held that reference to the wealth or poverty of either party is improper argument.[5] Repeatedly asking the jury who is going to pay in the manner done by plaintiff's counsel raised the inference of, and sympathy for, an alleged inability to pay those expenses. Other state jurisdictions have held that even a single reference to financial condition of litigants or the ***ability*** of plaintiff to pay the alleged damages is prejudicial. In Lenz v. Julian, 657 N.E. 2d 712, 719 (Ill. App. 1995) defendant's attorney stated in closing argument: "I don't think that its fair that [defendant] Joseph Julian, for the next 50 years should have to pay." The Lenz court stated: "To warrant reversal, however, the language utilized in a reference to defendant's financial condition must be reasonably understood to refer to the financial status of one of the parties and must result in prejudice to the complaining party." Id. The court found that the statement was a clear reference to the defendant's personal responsibility and lack of ability to pay a judgment. The court found it particularly disturbing in light of the fact that defendant's attorney, prior to trial, had filed a motion in limine to bar the introduction of evidence showing that the state would indemnify the defendant. Thus, the court stated: "Aside from being improper, the statement complained of, was presumably false. The comment could only serve to appeal to the sympathy of the jury and under the circumstances it constituted reversible error." Id.

Those same exact circumstances can be found in the present case. The clear

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[5]Garcia v. Sam Tinksley Trucking, Inc., 708 F.2d 519, 522 (10th Cir. 1983)(citing United States v. Stahl, 616 F.2d 30, 33 (2nd Cir. 1980); Draper v. Air Co., Inc., 580 F.2d 91, 95 (3rd Cir. 1978); Eisenhauer v. Berger, 431 F.2d 833, 837 (6 Cir. 1970). See also United States v. Socony Vacuum Oil Co., 310 U.S. 150, 239, 60 S. Ct. 811, 851, 84 L.ed. 1129 (1940)(court held appeals to class prejudice to be highly improper).

inference from plaintiff's counsel's comments were that plaintiff suffered from a lack of ability to pay for those damages.[6] California courts have long held that a showing of poverty of the plaintiff is highly prejudicial. In Hoffman v. Brant, 421 P.2d 425, 428 (Cal. 1966), counsel for defendant stated that the amount demanded would send his client to a home for the indigent. The Hoffman court held that the deliberate suggestion of poverty was improper and false, since defendant was in fact covered by insurance, and a curative instruction did not cure the prejudice. Id. at 429. Likewise, in the present case, any instruction by the court does not solve the prejudice. Once the jury is inflamed the remainder of the trial remains tainted. The cases cited above are strikingly similar to the present case and not only did plaintiff's counsel make reference on serval occasions to plaintiff's alleged inability to pay her damages, but the implications made by plaintiff's counsel were also false.

The fact of prejudice is highlighted by the fact that these statements were made by plaintiff's counsel and his experts, thus on more than one occasion, and that a large and excessive verdict was arrived at. In cases involving improper reference to wealth or poverty, courts have held that large or excessive verdicts are an indication of prejudice. Garcia, 708 F.2d 519, 522-23 (citing City of Cleveland v. Peter Keiwit Sons, Co., 624 F.2d 749, 759 (6th Cir. 1980); Koufakis v. Carvel, 425 F.2d 892, 901-02 (2nd Cir. 1970). The instant case clearly resulted in an excessive verdict in light of the injuries sustained by the plaintiff, and the questionable causal connection between the subject accident, and

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[6]Later it would come out that plaintiff had insurance which would cover those expenses. Thus, just as in Lenz the presumed inability to pay was fiction.

plaintiff's ongoing complaints demonstrated by her gaps in treatment.

The proper remedy for prejudicial attorney misconduct is a new trial. The standard for making this determination is whether the errors were "real and substantial and such as may reasonably be supposed would affect the result." Nelson v. Trujillo, 657 P.2d 730, 734 (Utah 1982)(citations omitted). Here, by commenting that plaintiff wanted to know who was going to pay for her lifetime medical expenses, the jury likely inferred that if the defendant did not pay for plaintiff's medical expenses that plaintiff would unjustly be left with hundreds of thousands of dollars in future medical expenses. This implication was known to be false because her medical expenses were covered by health insurance. Second, as above stated, the inflated verdict in this matter also is an indication of prejudice.

III. THE TRIAL COURT SHOULD HAVE GRANTED THE DEFENDANT A DIRECTED VERDICT; THE EVIDENCE PRESENTED DOES NOT SUPPORT THE VERDICT

The trial court should have directed a verdict for defendant. The evidence brought forth in trial does not support the verdict. Defendant made a mition for a directed verdict which was denied. (V. 6, p. 121). Defendant's counsel maintained that the relationship between the damages claimed in the accident required speculation on the part of the jury, that therefore any non-speculative damages were under the amount of the Utah No-Fault Acts tort threshold, and defendant was entitled to a directed verdict.

The evidence before the court simply does not sustain the largest part of the verdict, that is, $750,000.00 for future medical expenses. The jury so acted, even in light of the fact that there was no evidence that those medical expenses would be incurred to a

certainty. In fact, the witnesses did not even testify that they would most likely be incurred.[7] The only testimony for the plaintiff came from Mr. Rollins, who maintained an opinion that the plaintiff should have "access" to vast amounts of money in case she feels like having treatment in the future. The following testimony of Dr. Rollins occurred at trial:

> Question: Are you saying she is going to see a neurologist, an orthopod ten times? What are you telling the jury?
> Answer: I am just saying that she should have access on suitable and appropriate basis to these specialists.
> Question: As a group?
> Answer: No. Sometimes she may in given period of time see only a neurologist or only a psychiatrist, or only a podiatrist.[8] The idea being that she does needs to have access even when the need is there and if she doesn't, then have that established and doesn't have the discretionary funds to do that, she may not be able to access that service from that specialist.

(V. 5, p. 100, ls. 13-19). In other words, the damages were far more speculative than those that had actually been incurred. For these speculative damages, the jury awarded three-quarters of a million dollars. The verdict is therefore inconsistent on its face and the jury's conclusion that only $13,000 out of $42,000 of medical expenses were attributable to the accident must be based on a determination that other $29,000 of medical expenses were not related to the accident. When comparing these two categories of damages, this court can only conclude that the jury misapprehended the evidence and rendered an inconsistent verdict. Because Dr. Rawlings' testimony is not sufficiently valid so as to lay the basis for

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[7]Defendant recognizes that plaintiff attempted to veil the conclusions of his expert with broad questions regarding probability, but in light of what the witness actually testified to, those broad statements cannot suffice as "magic words."

[8]Defendant has found no reference to foot injuries in the remainder of the trial.

the damages, this court must conclude that the evidence was insufficient to support the verdict. The evidence cannot support the verdict because Mr. Rollins' testimony lacked the requisite certainty and was inadmissable under State v. Rimmasch.

Lack of certainty. If the testimony of Mr. Rollins is excluded, then the matter must be remanded for a new trial. Without Mr. Rollins' testimony, there is insufficient evidence to support the verdict. Even if this court assumes that Mr. Rollins' testimony met the standards of admissability, his conclusory statements that his opinion was made to a degree of "reasonable rehabilitation probability" cannot form the basis of a damage award. The Utah Supreme Court in Robinson v. Hreinson, 17 Utah 2d 261, 409 P.2d 121 (Utah 1965) held:

> For this reason the jury should not be allowed to assess future damages on probability, but only such damages as it believes from a preponderance of the evidence the plaintiff will with reasonable certainty incur in the future."

Id. at 125.[9] This was not the standard that any of plaintiff's witnesses testified to. Further, even though the witnesses claimed to speak in terms of probability, their underlying testimony did not reflect that standard. Dr. Ashburn did not testify that plaintiff would have the pump for the rest of her life. He indicated that initially a trial for the pump would be necessary. Obviously, if the pump failed, the pump, the replacement pumps, and all maintenance costs related thereto would not be incurred.

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[9]cf. Brown v. Johnson, 24 Utah 2d 388, 472 P.2d 942 (Utah 1970). Brown is distinguishable because the witness testified the 15% ("15 out of each 100 people ... would positively require future surgery") chance of surgery was certain. Further, as Justice Henroid points out in his concurrence and dissent, the language in Brown as to possibility is obiter dicta. Id. at 946 (Henroid, J. dissenting).

Further, plaintiff's claims to future lost wages arise out of a claim that she can no longer physically do her job, or in other words, she has a lost earning capacity. "However, in order to recover for lost earning capacity, the loss must be proven with 'reasonable certainty,' although not 'mathematical certainty.'" The most that any witness on behalf of the plaintiff testified to was a "probable" loss of capacity. Up until trial, the plaintiff has been working 50-60 hours a week. Accordingly, Mr. Rollins' testimony lacked the requisite certainty upon which a jury can rest its verdict.

Mr. Rollins' testimony was inadmissable. The opinion of an expert is limited by the foundation laid for it. Patey v. Lainhart, 1999 UT 31, ¶23, 977 P.2d 1193. Conclusions of the expert are inadmissable "where an expert witness has not testified to sufficient facts on which to base his opinion." Id. (quoting Edwards v. Didericksen, 597 P.2d 1328, 1331 (Utah 1979)). To simply put forth an expert's qualifications is never enough; the commensurate foundation must still be laid. State v. Pendergrass, 803 P.2d 1261, 1265 (Utah App. 1990). Further, where the expert opinion is based upon novel scientific principles or techniques, the proponent of the expert testimony must show that the conclusions are inherently reliable. State v. Rimmasch, 775 P.2d 388, 396 (Utah 1989). "Casting the Phillips/Kofford standard in terms of the rubric of rule 702, it can be said that evidence not shown to be reliable cannot, as a matter of law, 'assist the trier of fact to understand the evidence or to determine the fact in issue' and therefore is inadmissable." Rimmasch, 775 P.2d at 397-98. Therefore, "the proponent of scientific evidence that does not qualify for judicial notice must make an initial foundational showing that convinces the

trial court that the principles or techniques underlying the proffered testimony meet Phillips' standard of inherent reliability before the trial court can proceed to consider the normal foundational questions appropriate to any expert testimony." Id. at 398.

As a result, "the trial court should carefully explore each logical link in the chain that leads to expert testimony given in court and determine its reliability." This did not occur in the present case. Defendant had a specific objection that Mr. Rollins testimony encompassed an unique science, and that further foundation needed to be laid in order for the testimony to be admissable. (V. 5, ps. 95-96). Mr. Rollins did not testify that his methods were generally acceptable in his field, or that the data he used was inherently reliable. Mr. Rollins did not know how many rehabilitationists existed, and conceded that the school where he got his degree no longer offers the degree. Mr. Rollins admitted he did nothing to verify his conclusions, and that his line of work is not an exact science, but an art. Finally, Mr. Rollins testified that he does not follow up on the majority of his patients to see if his conclusions were correct. The trial court applied an erroneous standard for the admission of evidence which is error as a matter of law and reviewed for correction. Stevenett v. Wal-mart Stores, Inc., 977 P.2d 508 ¶ 8(Utah App. 1999).

Thus, the necessary foundation was not laid. The science employed was shown to be unique, but the inquiry required by Rimmasch was ignored. The testimony was actually shown to be unreliable. Accordingly, the opinion testimony was inadmissable and it was error for the trial court to allow it. Defendant suffered great prejudice in that the jury based the largest part of its verdict on future medical damages, and thus upon the faulty opinion

testimony of Mr. Rollins. This matter must be remanded for a new trial.

IV. THE TRIAL COURT ERRED BY ALLOWING PLAINTIFF TO CALL A WITNESS TO REBUT THE TESTIMONY ELICITED FROM DR. KNORPP ON A CROSS-EXAMINATION

At trial, the defense presented Dr. Scott Knorpp as a medical expert to refute the claims of plaintiff's treating physicians that plaintiff's ongoing complaints were caused by the subject accident. On cross-examination, plaintiff's counsel focused primarily on two alleged telephone conversations which Dr. Knorpp had with plaintiff's physical therapist. The obvious purpose of this cross-examination was to attack Dr. Knorpp's veracity when Dr. Knorpp denied these allegations. Plaintiff's counsel then called plaintiff's physical therapist, over objection, to rebut the testimony of Dr. Knorpp elicited on cross-examination by plaintiff's attorney.

Rebuttal evidence has been defined as "evidence tending to refute, modify, explain, or otherwise minimize or nullify the effect of the *opponent's evidence*." Randle v. Allen, 862 P.2d 1329, 1338 (Utah 1993)(emphasis added). "Rebuttal evidence should be limited to evidence made necessary by the opponent's case in reply, and evidence required to counter new facts presented in the defendant's case in-chief. The purpose of rebuttal evidence is not to merely contradict or corroborate evidence already presented, but to respond to new points or evidence first introduced by the opposing party." Astill v. Clark, 956 P.2d 1081, 1086 (Utah App. 1998). As these cases suggest, rebuttal evidence is not proper unless it is made necessary by evidence presented in the opponent's case in-chief. The evidence at issue was not introduced by an opposing party. Instead, it was introduced

by plaintiff. Thus, no rebuttal can be allowed as to that evidence.

Evidence first introduced by cross-examination cannot be considered evidence presented by the opponent's case in-chief. State v. Barney, 681 P.2d 1230, 1231 (Utah 1984). Here, the defendant's case in-chief, and specifically its direct examination of Dr. Knorpp made no mention of alleged conversations between Dr. Knorpp and the plaintiff's physical therapist. These alleged conversations were brought up by plaintiff's counsel during his cross-examination of Dr. Knorpp; in fact, they were the main focus of his cross-examination. Having elicited the expected denials regarding his alleged inflammatory remarks to the physical therapist, plaintiff's counsel was then allowed to complete his ambush of Dr. Knorpp and the defense by calling the physical therapist to rebut testimony first introduced during plaintiff's counsel's cross-examination.

Based on the case law above, it is clearly improper to allow plaintiff's attorney to call a rebuttal witness to rebut evidence he himself had elicited. As stated in Astill v. Clark, "the purpose of rebuttal evidence is not merely to contradict or corroborate evidence already presented, but to respond to new points in evidence first introduced by the opposing party." Id. at 1086. Federal case law also supports defendant's contention that it was improper to allow plaintiff's physical therapist to testify as a rebuttal witness. In Koch v. Koch Industries, Inc., 203 F.3d 1202 (10th Cir. 2000), the Tenth Circuit upheld a district court's refusal to allow plaintiff's attorney to call a rebuttal witness for testimony that plaintiff's counsel had intentionally elicited from defendant's witness on cross-examination. The Court held:

> Contrary to plaintiff's assertion in support of their argument for a rebuttal witness, Markol did not dispute Hall's testimony, but rather disagreed with the testimony it gives. Further, even if Markol had disputed Hall's testimony, the plaintiff's attorney intentionally elicited such testimony. . . when an attorney conducting cross-examination affirmatively doles out specific testimony, as it occurred here, the district court does not abuse using its discretion in disallowing rebuttal to that testimony.

Koch, 203 F.3d at 1226.

The testimony of Dr. Knorpp came as no surprise to plaintiff. The cross-examination of Dr. Knorpp was a trap that plaintiff anticipated well before trial. Courts have rejected the use of such rebuttal testimony. In Turner v. Nelson, 872 P.2d 1021, 1024 (Utah 1994), the Supreme Court articulated a "reasonable anticipated test" to determine whether rebuttal testimony should be allowed. The court stated: "The issue hinges on whether the evidence 'sought to be rebutted could reasonably have been anticipated prior to trial.'" Turner, 872 P.2d at 1023. Not only had plaintiff anticipated Dr. Knorpp's testimony, but plaintiff's counsel deliberately solicited such testimony so that he could then attempt to rebut the testimony with plaintiff's physical therapist. Federal courts have held that evidence that was available to plaintiff during his case in-chief and not unexpected, is not proper rebuttal evidence. Pandit v. American Honda Co., Inc., 82 F.3d 376, 383 (10th Cir. 1996); Lubanski v. Coleco Ind., 929 F.2d 42, 47 (1st Cir. 1991).

By allowing the therapist to rebut Dr. Knorpp, plaintiff was given the last word and was allowed to sandwich the defense on an inflammatory issue. The inflammatory nature of this evidence is underscored by plaintiff's closing arguments a conspiracy exists between defendant's counsel and Dr. Knorpp. (V. 8, ps. 13, 84, 85, 86, 89). It was error to

allow the rebuttal witness, and this error resulted in significant prejudice. As such, a new trial must be granted.

V. THE TRIAL COURT ERRONEOUSLY EXCUSED MR. TAMS AS A PROSPECTIVE JUROR

It was error for the trial court to excuse Mr. Tams for cause. The total inquiry regarding Mr. Tams is reproduced in Addendum C. In essence, Mr. Tams related that his daughter was involved as a defendant in a lawsuit in New York. Mr. Tams raised the issue of the now famous McDonalds hot coffee case, but conceded:

> I just felt that that coffee case was excessive based on the way it was reported. Certainly not from anything factual. That's one of those things where I think it would be difficult for me, based on what I know of that, to have awarded the amounts that were awarded. If it was justified in some way that I don't know of now, the story behind the store type thing, it wouldn't then be a problem.

(V. 1, p. 97). Mr. Tams did not believe juries were out of control. Mr. Tams even indicated that he would be inclined under the right circumstances to award a significant verdict. Regarding a hypothetical case involving a daughter, Mr. Tams indicated that he would probably give great weight to his daughter's statement, but would still endeavor to try the case on its merits. The sum and substance of Mr. Tams' statements were that he would try to be fair and impartial and look at the merits of any given case.

The erroneous exclusion of Mr. Tams effectively gave the plaintiff more peremptory challenges than the defendant. Mr. Tams indicated that he would evaluate each case on its own merits, which is all that can be expected from any juror. In reviewing the exchange above, this court must contemplate the exchange between the court and the juror as a whole, not focusing on a single remark. State v. Young, 853 P.2d 327,343 (Utah 1993).

On balance, Mr. Tams was impartial. Even if an inference of bias could be found, which it cannot, the trial court failed to rehabilitate the juror as required. "Utah law requires trial courts to expend significant effort in rehabilitating a potential juror to whom even an inference of bias has attached.." State v. Baker, 884 P.2d 1280, 1282 (Utah App. 1994), rev'd on other grounds, State v. Baker, 935 P.2d 503 (Utah 1997). See also, Rasmussen v. Sharapata, 895 P.2d 391, 395 (Utah App. 1995). The trial court is required to rehabilitate until the suggestion of bias is dispelled. State v. Morgan, 865 P.2d 1377, 1381 (Utah App. 1993). The trial court failed in this regard and defendant was prejudiced. Mr. Tams presence on the jury could have significantly changed the verdict.

In People v. Lefebre, 5 P.3d 295 (Colo. 2000), the court held that it was reversable error to excuse a juror for cause without a proper basis. The Lefebre court followed its own precedent in Bustamante v. People, 297 P.2d 538, 540 (Colo. 1956) which recognized that erroneously dismissing a juror for cause effectively gives an adversary an additional peremptory challenge, which creates an imbalance between the parties and undermines the essential purpose of peremptory challenges. Id. Accordingly, the trial court committed reversable error when it excused Mr. Tams. The trial court applied an erroneous standard in finding that Mr. Tams should be excused. Likewise, the trial court failed to meet its obligation to rehabilitate Mr. Tams further.

VI. THE ERRORS COMMITTED BY THE TRIAL COURT CONSTITUTE CUMULATIVE ERROR

While it is clear that the trial court committed error in the proceedings presented here, defendant is cognizant that the majority of issues are reviewed under an abuse of

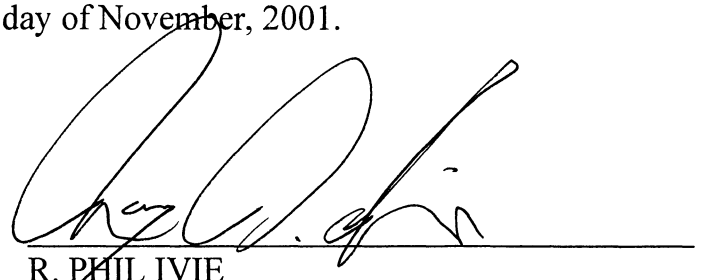
discretion standard. Even under this standard, reversal is required. Reversal is required because of the prejudice suffered by the defendant. Moreover, even if the individual issues presented above do not warrant reversal, the errors amount to cumulative error in that they collectively undermine any conclusion that a fair trial occurred. Where the cumulative effect of several errors undermine an appellate court's confidence that the defendant had a fair trial, reversal is mandated. Whitehead v. American Motor Sales Corp., 801 P.2d 920, 928 (Utah 1990). Absent these errors, the verdict in this matter would have been different. Thus, the defendant has suffered great prejudice and reversal is mandated.

CONCLUSION

Because the defendant was not given a fair trial in this matter, this matter must be reversed. Plaintiff's surprise evidence alone warrants a new trial. Trials by ambush simply cannot be countenanced by this court. The arguments of counsel as allowed by the trial court further prejudice the defendant inviting the jury to render its verdict on an inflammatory basis. The jury should have been advised as to where the defendant was. The fact that the trial court allowed the defendant to advise the jury as to the defendant's exact location at the end of trial, does not undue the prejudice suffered by the defendant during the course of that trial. More importantly, the manacles placed upon the defendant by the court at the plaintiff's urging were most prejudicial given the statements made by the defendant in closing arguments. Those arguments constitute a basis for reversal even under the plain error standard. Lastly, given all the facts and circumstances of the case, this court's confidence in a fair trial must be undermined and a new trial must be granted.

For the foregoing reasons, defendant requests this court to reverse the trial court and order a new trial in this matter.

DATED AND SIGNED this 6th day of November, 2001.

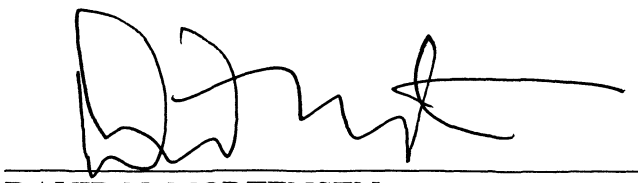


R. PHIL IVIE
DAVID N. MORTENSEN
IVIE & YOUNG
Attorneys for Defendant

MAILING CERTIFICATE

I hereby certify that two true and correct copies of the foregoing Brief of Appellant was sent with postage prepaid thereon this 5th day of November, 2001 to the following:

Lynn C. Harris
HARRIS & CARTER
3325 No. University Ave., Suite 200
Provo, Utah 84604



DAVID N. MORTENSEN
IVIE & YOUNG

sf1133aOctober2001

ADDENDUM A

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Provo, Utah 84604

Telephone: 375-9801

IN THE FIRST JUDICIAL DISTRICT IN AND FOR
BOX ELDER COUNTY, STATE OF UTAH

--oooOooo--

RHONDA MERRYWEATHER,	)	
	)	JUDGMENT
Plaintiff,	)	
	)	
vs.	)	
	)	Civil No. 980100391
CARSON R. CALLISTER,	)	
	)	Judge Ben H. Hadfield
Defendant.	)	

--oooOooo—

THIS ACTION came on for trial before the Court and Jury, Honorable Ben H. Hadfield, District Court Judge, presiding, and the issues have been duly tried and the Jury having duly rendered its verdict by special verdict form on October 3, 2000,

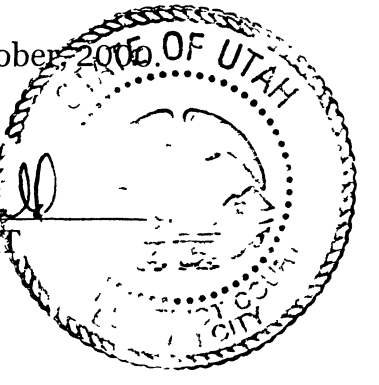
IT IS ORDERED AND ADJUDGED that plaintiff, Rhonda Merryweather, recover from the defendant, Carson R. Callister, the sums of:

(a) $1,300,568.00 in special and general damages, and

(b) the sum of $ 4676.44 which is interest on the sum of $13,000.00 awarded for past medical damages, through October 3, 2000, and

(c) plus court costs in the sum of $ 5182.02 .

DATED this 20 day of October, 2000.



CLERK OF THE COURT
First Judicial District
Box Elder County

MAILING CERTIFICATE

I HEREBY CERTIFY that I personally mailed a true and correct copy of the foregoing on this 11th day of October, 2000, by first-class, U.S. Mail, postage prepaid to the following:

R. Phillips Ivie
Sherlynn Fenstermaker
IVIE & YOUNG
48 North University Ave.
P.O. Box 657
Provo, UT 84603

Secretary

713

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 980100391 by the method and on the date specified.

METHOD	NAME
Mail	LYNN C HARRIS ATTORNEY PLA 3325 N.UNIVERSITY AVE.STE.200B JAMESTOWN SQ.,CLOCKTOWER BLDG. PROVO, UT 846040000
Mail	RAY PHILLIPS IVIE ATTORNEY DEF 226 W 2230 N STE 210 PO BOX 657 PROVO UT 84603

Dated this 25 day of Oct, 2000.

Deputy Court Clerk

IN THE FIRST JUDICIAL DISTRICT COURT
BOX ELDER COUNTY, STATE OF UTAH

RHONDA MERRYWEATHER, **Plaintiff,** **vs.** **CARSON R. CALLISTER,** **Defendant.**	**SPECIAL VERDICT FORM** **Case No. 980100391**

MEMBERS OF THE JURY:

Please answer the following questions from a preponderance of the evidence. If you find the evidence preponderates in favor of the issue presented, answer "Yes." If you find the evidence is so equally balanced that you cannot determine a preponderance of the evidence, or if you find that the evidence preponderates against the issue presented, answer "No." Also, any damages assessed must be proven by a preponderance of the evidence.

The defendant, Carson Callister, has admitted negligence at the time of the collision.

1. Was defendant Carson Callister's negligence a proximate cause of the injuries claimed by the plaintiff?

   ANSWER: Yes X No _____

If you answered question 1 "No," please sign the verdict form and return it to the Court. If you answered question 1 "Yes," continue.

2. Has the plaintiff incurred at least $3000.00 in medical expenses as a result of defendant's negligence?

   ANSWER: Yes X No _____

3. As a result of the defendant's negligence, did the plaintiff sustain a permanent disability or a permanent impairment based upon objective findings?

ANSWER: Yes X No _____

If you answered either 2 or 3 or both "Yes," continue. If you answer 2 and 3 "No," please sign the verdict form and return it to the Court.

4. State the amount of special and general damages, if any, sustained by the plaintiff as a proximate result of the injuries complained of. If such questions were not answered "Yes," do not answer this question.

Special Damages:

A. Past medical damages	$ 13,000
B. Future medical damages	$ 715,568
C. Loss of Past and Future Earnings	$ 240,000
General Damages	$ 332,000
TOTAL	$ 1,300,568

Dated this the 3RD day of OCTOBER, 2000.

_____
Foreperson

ADDENDUM B

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF UTAH/
IN AND FOR THE COUNTY OF BOX ELDER

RHONDA MERRYWEATHER,	**MEMORANDUM DECISION**
Plaintiff,	**Case No. 980100391**
vs.	
CARSON R. CALLISTER,	**HON. BEN H. HADFIELD**
Defendant.	

This matter comes before the court on Defendant's Motion for a New Trial. The court requested supplemental memoranda pursuant to its memorandum decision of 27 December 2000. The court has considered the memoranda supporting and opposing the original motion as well as the supplemental memoranda and the argument presented at the hearing on this matter held 1 March 2001. A review of the case law indicates that the court cannot now raise the inconsistency in the verdict. Only Defendant's Rule 59(a) motion remains for consideration.

I.

Defendant argues that he was surprised at trial by the revelation that Plaintiff was demoted from her job. Defendant argues that such surprise allows a new trial pursuant to Rule 59(a)(3). Notably, Defendant does not indicate an interrogatory response that should have been supplemented

according to the old Rule 26(e)(2) that is applicable to this case.[1] Nor does the Defendant proffer what evidence he could offer on the issue at a retrial. Rather, the Defendant argues that its trial strategy was to argue an increase in Plaintiff's earnings that cast doubt on both the Plaintiff's lost earnings and the significance of Plaintiff's injuries and that the "surprise" testimony eviscerated that strategy.

Both Defendant and Plaintiff listed the hospital administrator, Mr. Jex, as a potential witness. There is no dispute that Plaintiff had, in a number of disclosures, indicated the Plaintiff's ongoing problems at her work. The crux of the disagreement over this issue is Defendant's insistence that Plaintiff's counsel knew about the demotion on the first day of trial as evidenced by his opening statement. Defendant incorrectly points to the decrease in hours from full time to 32 hours a week as the nondisclosed demotion, when, in fact, the demotion was from a 32 hour a week job as an administrator to a floor nurse position. The difference explains the comments of Plaintiff's counsel at the time the court considered the matter as opposed to Counsel's opening statement. Defendant was on notice that Plaintiff took issue with Defendant's theory of the case. Any surprise over the demotion was due as much to Defendant's failure to learn of the problems as it was due to Plaintiff's failure to disclose them.

Further, the court limited Plaintiff's expert to use of exhibits created before the revelation on Plaintiff's demotion. Although the Plaintiff sought to introduce modified versions of the exhibits that took into account the demotion, the court denied Plaintiff's request. The court restricted Plaintiff to damage calculations made prior to the demotion. The court cannot grant Defendant a new trial on the basis of the alleged surprise.

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[1]The court notes that the result might be different under the new rule which requires disclosure of damage computation and supplementation of responses when changes occur

II.

Defendant next argues that the court should not have allowed Plaintiff to introduce evidence impeaching Dr. Knorpp's testimony regarding a telephone conversation he had with the physical therapist. Defendant admitted at the hearing in this matter that the rebuttal testimony may have been proper 608(c) evidence of bias. Defendant argues that the evidence was improper rebuttal evidence as it was offered to rebut cross examination testimony elicited by Plaintiff. If the evidence could be properly admitted under 608(c) then it could be admitted whether or not Dr. Knorpp testified about the telephone conversation. A witness's bias is not put in issue until he or she testifies. Once a witness testifies, Rule 608(c) allows evidence of bias to be presented by extrinsic evidence. The rebuttal was Plaintiff's only opportunity to present extrinsic evidence of bias as Dr. Knorpp was called during the Defendants case. It is coincidental that the evidence of bias in this case also impugned the credibility of Dr. Knorpp on other grounds. The court will not grant a new trial on the rebuttal testimony issue.

III.

The Defendant raises several grounds for a new trial that can be lumped into the category "misconduct of counsel." Plaintiff counsel's statements, when taken in context, would not have caused the jury to perceive impecuniosity. Counsel made the statements in connection with his theme of charging the party who "started the fire," not in the context of Plaintiff's inability to pay. The court gave cautionary instructions to both the jury and to Plaintiff's counsel when he stepped too close to the line. For example, stating in the presence of the jury that counsel was not under oath and should limit himself to questions. In another instance the court sustained the Defendant's objection during counsel's

closing argument. Notably, in the last instance, the Defendant did not request any curative instruction to the jury regarding the remark. Defense counsel also "apologized" and told the jury to disregard his personal feelings about the case. Defendant now argues that the "apology" actually reinforced the improper comment. The Defendant did not, however, object to the apology or request any curative instruction. The Defendant cannot now complain that the "apology" and the court's sustaining the objection did not cure the improper comment. The court does not believe that the instances cited by Defendant rise to the level of error. If they did, it was harmless error.

IV.

Defendant in the alternative asks for a remittiture but provides no authorities on the issue. At its most fundamental level, this case troubles the court. The simplicity of the accident; the almost eight month period between the accident and the onset of any documented, significant medical problems; and the nature of the injuries all make the 1.3 million dollar verdict the appropriate subject of careful scrutiny. Defendant's argument at the hearing on this matter that this is the largest soft tissue verdict ever in Utah, is not lost on the court. The court has carefully reviewed the arguments of counsel and the conduct of the trial. Despite repeated efforts to find a good reason to grant a new trial, the court in every instance comes back to the fundamental issue: there was evidence presented to the jury that supports the verdict. This court viewed the evidence and witnesses in a different light than did the jury.[2] The court was extremely surprised by the size of the verdict. After considerable reflection, the court recognizes that the difference between the jury's verdict and an award which the court would have

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[2]The court is aware of Canon 3(B)(10) and has complied with the Canon. No criticism has been leveled at the verdict other than in this opinion.

thought appropriate is grounded in the determination of which witnesses are most credible. On this issue the court is not willing to substitute its views for those of the jury. The court would not hesitate to grant a new trial if it could, in good conscience, say that there was a part of the verdict that did not have evidentiary support. The court also searched for evidence of passion or prejudice in this case and cannot point to any evidence that the jury was influenced by any improper motive. The court does not believe that the verdict rises to the level that, as a matter of law, it indicates passion or prejudice. The special verdict in each category had evidentiary support.

For the foregoing reasons, Defendant's motion for a new trial is, somewhat reluctantly, denied. Counsel for the Plaintiff is directed to prepare an Order in conformance with this Memorandum Decision.

Dated this 7th day of March 2001.

Judge Ben H. Hadfield
District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 7th day of March, 2001, I mailed a true and correct copy of the foregoing Memorandum Decision, in the case of *Merryweather vs. Callister, case number 980100391*, as follows:

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Lynn C. Harris
Attorney At Law
3325 North University Avenue
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STATE OF UTAH
FIRST DISTRICT COURT
BOX ELDER COUNTY

Clerk of Court

IN THE FIRST JUDICIAL DISTRICT COURT
STATE OF UTAH, IN AND FOR THE COUNTY OF BOX ELDER

RHONDA MERRYWEATHER, Plaintiff, v. CARSON R. CALLISTER Defendants.	*	MEMORANDUM DECISION Case No: 980100391

This case is before the court on Defendant's motion for a new trial or in the alternative for a remittiture. The oral argument on Defendant's motion has been set for 5 February 2001. The court has considered the pleadings of the parties as well as the file in this matter.

The court notes that the verdict awarded only $ 13,000.00 of past medical damages. The parties stipulated that $ 42,421.26 in past medical damages were incurred by the Plaintiff although defendant argued strenuously that part of the past medicals were a result of Plaintiff's psychological and family problems. On this issue the jury attributed only thirty-one percent of the medical expenses to Defendant. The jury awarded $ 715,000.00 in future medical damages or one-hundred percent of the amount indicated by Plaintiff's expert. The inconsistent awards are troublesome.

The court desires to give the parties the opportunity to more fully brief the issues surrounding a remittiture. Should the parties believe it necessary, the court

is even willing to allow time for the record to be transcribed so that the parties and the court have an opportunity to fully consider the record before denying or granting a new trial or considering a remittiture.

The parties are granted an additional twenty days to file memoranda relating to the issue of a remittiture. Each party shall file a memorandum and there shall be no replies. This matter will remain scheduled for 5 February 2001 unless either party requests an extension of time to obtain transcription of the record.

Dated this 27 day of December, 2000.

BY THE COURT

B. H. Hadfield

Ben H. Hadfield
District Court Judge

STATE OF UTAH
FIRST DISTRICT COURT
BOX ELDER COUNTY

CERTIFICATE OF MAILING

I hereby certify that on the 27th day of December, 2000, I mailed a true and correct copy of the foregoing Memorandum Decision, in the case of *Merryweather vs. Callister, case number 980100391*, as follows:

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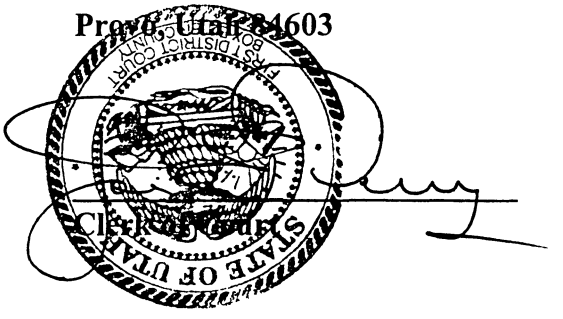

Clerk of Court

ADDENDUM C

CONCERN IS DO YOU FEEL THAT YOU CAN BE FAIR TO BOTH SIDES?

MS. SALE: I THINK SO. YEAH, I THINK I COULD.

MR. HARRIS: I THINK WHAT YOU'RE FEELING IS THE WEIGHT OF BEING A JUROR.

THE COURT: AND THAT'S NOT BAD. IT IS A BIG RESPONSIBILITY.

MR. HARRIS: I'M NOT SO SURE OTHER PEOPLE WOULD HAVE RAISED THEIR HAND.

MR. IVIE: I HAVE NO QUESTIONS, YOUR HONOR.

THE COURT: ALL RIGHT. YOU MAY GO BACK INTO THE COURTROOM. THANK YOU. WE NEED MR. TAMS NOW. WE SAVED THE NICEST CHAIR IN THE OFFICE FOR YOU.

MR. TAMS: THANK YOU. I'LL TRY NOT TO GO TO SLEEP.

THE COURT: IN THE QUESTIONING IN THERE YOU RAISED YOUR HAND ABOUT BEING AWARE OF SOME POTENTIALLY SIGNIFICANT ISSUE. I'LL ALLOW MR. HARRIS TO ASK ONE OR TWO QUESTIONS AND THEN MR. IVIE.

MR. HARRIS: I WANT TO ASK WHAT YOU'VE SEEN AND THEN IF YOU'VE DRAWN ANY CONCLUSIONS OR PRECONCEIVED IDEAS OR ANYTHING ABOUT THAT?

MR. TAMS: THERE'S A COUPLE OF THINGS IT GOES BACK TO. ONE IS CERTAINLY WITH MY DAUGHTER AND THE LAWSUIT SHE'S IN. THAT DOES PUT A LITTLE STRESS ON IT.

MR. HARRIS: IS SHE THE DEFENDANT IN THAT ONE?

MR. TAMS: SHE IS.

MR. HARRIS: THAT'S THE ONE IN NEW YORK?

MR. TAMS: YES. ALSO WHAT I HEARD IN THE QUESTIONING WAS SOMETHING ABOUT HAVE YOU HEARD ANYTHING ON THIS CASE. WHAT I MEAN IS ABOUT EXCESSIVE AWARDS OF COMPENSATION. SOME THINGS THAT COME TO MY MIND ARE THINGS LIKE THE SPILLED COFFEE AND THE AWARD THERE. THAT DOES BOTHER ME A LITTLE BIT. OF COURSE, I DON'T KNOW ALL THE FACTS OF THE CASE, BUT IT DOES BOTHER ME.

MR. HARRIS: DOES HEARING THE NAME MCDONALD'S HOT COFFEE CASE, HAS THAT -- BEFORE YOU CAME HERE TODAY, BEFORE YOU HEARD ANYTHING ABOUT THIS CASE, DID YOU HAVE ANY PRECONCEIVED NOTIONS ABOUT LAWSUITS AND LAWSUITS FOR INJURIES?

MR. TAMS: LIKE I SAY, NOT IN THIS CASE BECAUSE I DON'T KNOW ALL OF THE DETAILS. I JUST FELT THAT THAT COFFEE CASE WAS EXCESSIVE, BASED ON THE WAY IT WAS REPORTED. CERTAINLY NOT FROM ANYTHING FACTUAL. THAT'S ONE OF THOSE THINGS WHERE I THINK IT WOULD BE DIFFICULT FOR ME, BASED ON WHAT I KNOW OF THAT, TO HAVE AWARDED THE AMOUNTS THAT WERE AWARDED. IF IT WAS JUSTIFIED IN SOME WAY THAT I DON'T KNOW OF NOW, THE STORY BEHIND THE STORY TYPE THING, IT WOULDN'T THEN BE A PROBLEM.

MR. HARRIS: DO YOU COME TO COURT TODAY WITH ANY KIND OF PRECONCEIVED NOTION THAT JURIES ARE OUT OF WHACK OR OUT OF CONTROL?

MR. TAMS: NO.

MR. HARRIS: AT LEAST NOT IN UTAH. ANY NOTIONS ABOUT WHETHER THINGS SHOULD BE CAPPED OR LIMITED OR RIGHTS TAKEN AWAY? SOME PEOPLE READ THAT STUFF AND END UP WITH SOME PRETTY INTERESTING IDEAS. THAT'S WHY WE DON'T WANT TO TALK ABOUT THEM IN FRONT OF THE WHOLE PANEL.

MR. TAMS: NO.

MR. HARRIS: OTHER THAN YOUR THOUGHTS ABOUT WHAT YOU HAVE EXPRESSED TODAY ABOUT YOUR DAUGHTER AND THE MCDONALD'S CASE, DO YOU HAVE ANY PROBLEM IN ASSURING US THAT YOU CAN BE FAIR TO BOTH SIDES AND BE IMPARTIAL?

MR. TAMS: THAT'S ONE OF THOSE THINGS, WHERE YOU HAVE A DAUGHTER SIMILARLY INVOLVED, IT'S KIND OF EMOTIONAL. I DO HAVE TO SAY THAT I REALLY THINK I COULD, BUT WHEN YOU START TO TALK ABOUT THOSE EMOTIONS, THERE'S GOING TO BE SOMETHING IN THE BACK OF MY MIND.

THE COURT: LET ME ASK YOU A FOLLOW UP QUESTION, MR. TAMS. YOU HAVE ANOTHER DAUGHTER THAT HAS A TRACK SCHOLARSHIP TO BYU. IF SHE WERE INJURED IN AN ACCIDENT AND COULD NO LONGER RUN, WOULD YOU FEEL THAT SHE SHOULD RECEIVE FAIR COMPENSATION FOR THAT?

MR. TAMS: CERTAINLY. THAT'S THE THING.

THE COURT: IN HER CIRCUMSTANCES IT MIGHT BE SIGNIFICANT COMPENSATION, WOULD YOU THINK?

MR. TAMS: I'M SURE IT WOULD BE.

MR. HARRIS: DON'T BE SHY.

THE COURT: JUST TELL US WHAT YOU THINK. I KNOW YOU HAVE MORE THAN ONE DAUGHTER.

MR. TAMS: AGAIN, THAT CASE IS CLOSE ON MY MIND. WE'VE DISCUSSED CERTAIN ASPECTS OF WHAT SHE'S GOING THROUGH. I WOULD DO MY BEST TO LOOK AT THE FACTS AND DECIDE BASED ON THE FACTS THAT ARE PRESENTED AND MAKE A DETERMINATION OF WHAT IS FACT AND GO FROM THERE.

MR. HARRIS: IT'S SOMETHING YOU WOULD JUST DO OR SOMETHING YOU THINK YOU CAN DO?

MR. TAMS: I THINK I CAN. IT'S KIND OF HARD TO SAY ABSOLUTELY. I THINK I CAN.

MR. IVIE: IF YOUR DAUGHTER WHO IS THE TRACK STAR HAD AN INJURY AND IT WAS THE TYPE OF INJURY THAT YOU FELT THE PERSON SHE WAS CLAIMING WAS RESPONSIBLE WAS NOT RESPONSIBLE, WOULD YOU HAVE ANY PROBLEM IN THAT PERSON NOT BEING HELD RESPONSIBLE FOR HER INJURY?

MR. TAMS: WHEN YOU TALK ABOUT THAT YOU'RE TALKING KIND OF PERSONAL. IN A GENERAL SENSE I COULD SAY YES. WOULD I GIVE GREAT CREDENCE TO MY DAUGHTER'S STATEMENT? YES. IT WOULD -- IF IT WERE PROVED TO ME THAT IT WAS NOT THE CASE, THEN I COULD MAKE THE RIGHT DECISION IN THAT CASE.

MR. IVIE: THE COURT WILL TELL YOU THAT THE BURDEN OF PROOF IN A CASE LIKE THIS IS ON THE PLAINTIFF TO PROVE THEIR CASE. DO YOU HAVE ANY PROBLEM WITH THAT CONCEPT?

MR. TAMS: NO.

MR. IVIE: NOTHING FURTHER.

THE COURT: YOU MAY GO BACK INTO THE COURTROOM. THANK YOU.

COUNSEL, LET ME JUST MAKE THIS OBSERVATION. IF WE KEEP HIM, WE'VE GOT 21. IF I SEND HIM OUT IT DOESN'T CREATE A BIG PROBLEM.

THE CLERK: THERE'S ANOTHER JUROR WHO WOULD LIKE TO COME BACK. THAT'S DANNY ANDERSON.

MR. HARRIS: MR. TAMS SORT OF TALKS BOTH SIDES OF THE FENCE.

THE COURT: I'LL LEAVE IT TO THE TWO OF YOU. I THINK, IF YOU WANT TO EXCUSE HIM FOR CAUSE, I'LL SEND HIM AWAY. HE WOULD BE A VERY INTELLIGENT AND VERY DILIGENT JUROR, WHICH IS WHAT YOU WANT. BUT ON THE OTHER HAND, HE'S RAISED ENOUGH OF AN ISSUE THAT IF ONE SIDE WANTS HIM OUT I'LL GRANT IT.

MR. HARRIS: I WOULD MAKE THAT MOTION.

MR. IVIE: I WOULD OBJECT. THERE'S VERY SPECIFIC STATUTORY GROUNDS TO DISMISS. I DON'T SEE ANYTHING THAT WOULD SUPPORT A FINDING THAT HE IS PREJUDICED AND WOULDN'T GIVE BOTH SIDES A FAIR TRIAL.

THE COURT: HE'S INDICATED THAT HE WOULD, BUT AT THE SAME TIME HE STRUGGLED SIGNIFICANTLY ON SEVERAL OCCASIONS INDICATING HOW MUCH THE ISSUE WITH HIS DAUGHTER IN

NEW YORK WEIGHS ON HIS MIND AND HOW EMOTIONALLY ATTACHED HE IS TO THAT. HE BELIEVES HE COULD SET IT ASIDE. HE REALLY STRUGGLED IN THAT ANSWER AND IT APPEARED TO THE COURT THAT -- WE DON'T KNOW ANY OF THE CIRCUMSTANCES OF THAT LAWSUIT, OTHER THAN HE VERY MUCH EMPATHIZED WITH HIS DAUGHTER AND FELT IT WAS A TREMENDOUS ISSUE FOR HIM AND FOR HER.

MR. IVIE: DOES THAT MEAN THAT WE CAN STRIKE ALL THE PEOPLE WHOSE SPOUSES HAVE PLAINTIFF'S LAWSUITS GOING ON? WE'VE GOT THAT AS WELL. PEOPLE BRING IN THEIR LIFE EXPERIENCES AND THE ONLY WAY THAT WE CAN STATUTORILY STRIKE THEM IS IF THEY SAY THAT THEY CANNOT BE UNBIASED. YOU SAID YOURSELF HE'D BE A CONSCIENTIOUS JUROR. HE'D BE A GOOD, HARD WORKING JUROR. AND HE WAS CANDID WITH US. HE TRIED TO BE HONEST AND TELL US THINGS SO THAT COUNSEL CAN EXERCISE AN INFORMED PEREMPTORY CHALLENGE.

THE COURT: LET'S HOLD THAT ONE FOR A MINUTE.

MR. HARRIS: IF I MAY MAKE THIS COMMENT TO MR. IVIE'S COMMENTS. WHAT HE SAID WAS THAT IN AN OBJECTIVE SORT OF GENERAL WAY HE WOULD TRY TO DO THAT, BUT HE HAD HUGE RESERVATIONS AS TO HIS CURRENT STATUS AND WHETHER HE WOULD BE ABLE TO DO THAT. THAT GOES SPECIFICALLY TO WHETHER HE CAN BE IMPARTIAL AND UNBIASED. THAT'S THE BASIS FOR THE CAUSE.

THE COURT: LET'S BRING IN DANNY ANDERSON FOR A

THE COURT: I WILL EXCUSE HIM AT THIS TIME. AS I INDICATED TO COUNSEL, I THINK HE'D BE AN EXCELLENT JUROR, BUT I DID NOTE HOW MUCH HE SEEMED TO STRUGGLE WITH THAT ISSUE AND WITH HIS EMPATHY FOR HIS DAUGHTER. I'M AFRAID THAT HE MAY SIMPLY IDENTIFY WITH THE CIRCUMSTANCES IN THIS CASE.

THAT LEAVES US WITH 19. I SUPPOSE WE CAN GO BACK IN NOW AND SELECT ABOUT THREE OR FOUR MORE. THAT'S GOING TO INVOLVE BACKING UP AND DOING A NUMBER OF QUESTIONS AGAIN. I'M NOT GOING TO GIVE YOU EACH 20 MINUTES MORE VOIR DIRE, BUT WHAT I THINK I WILL DO IS MOVE EVERYBODY UP IN THE SEATING CHART. THE NEXT THREE OR FOUR THAT I CALL WILL BE AT THE VERY BACK END, SO THAT AT BEST THEY'LL ONLY BE CALLED AS ALTERNATES. IN OTHER WORDS, THEY'LL ONLY BE NUMBERS --

MR. HARRIS: YOU'RE NOT GOING TO REPLACE THESE, JUST STICK THE OTHERS ON THE END?

THE COURT: YES. ON THE BACK ROW EVERYBODY WILL SHIFT TO THE LEFT AND WE'LL PUT THE NEXT THREE OR FOUR ON THE RIGHT END OF THAT ROW.

MR. HARRIS: I HAVE NO OBJECTION TO THAT.

MR. IVIE: NO OBJECTION.

THE COURT: I'LL DO AN EXPEDITED QUESTIONING AND GIVE YOU EACH MAYBE FIVE MINUTES.

MR. HARRIS: ALL I'M REALLY INTERESTED IN IS IF THEY HEARD THE QUESTIONS I RAISED AND HEARD THE QUESTIONS